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THE NATURE OF POSITIVE LAW

THE

NATURE OF POSITIVE LAW

BY

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TO

MY FATHER.

PREFACE.

It has now in several ways become evident that the idea of Law upon which Austin founded his system of Jurisprudence cannot be accepted as final, but must be treated as only a first approximation, valuable indeed, but defective, and therefore requiring to be supplemented by further enquiry. I was myself led to this opinion by discovering that the Austinian analysis threw so little light upon the real nature of legal Rights as to be of comparatively small value in investigating their substance as opposed to their mere enforcement. This view was pressed upon me again and again as I examined the various Rights of property, and I believe the current system breaks down entirely when we attempt to explain by it the Roman theory of Possession. Being thus led to distrust the results which I had long accepted as final, I found that there were two ways of attempting to correct them—the historical and the analytical. The former way reveals to us the actual manner in which the various elements of Law have come into existence, and if we compare the results which have been attained by different Jurists on the latter system, we discover the various aspects of Law that have from

time to time forced themselves on the notice of the legal philosopher. Each of these methods fortunately can be easily employed at the present time. The researches of Sir Henry Maine upon the early history of Law, and the luminous sketch of the rise of Roman Law which we have received from von Ihering of Vienna, enable us to grasp the different elements of Law in their very origin; while the theories of Law which have been quite recently elaborated in Germany enable us, by an actual comparison, to correct the deficiencies of Austin. These remarks show the general design and method of the present volume. The early, or historical, part contains enough to justify also a re-examination of the analysis of a legal Right, but the length to which the later part has gone in the discussion of the nature of Law, prevented my carrying the enquiry so far at present.

I wish to express the obligation which I am under to the two distinguished Jurists above mentioned, and if I have not always accepted the whole of their conclusions, it is because I preferred to follow the spirit rather than the letter of their teaching. The position which each occupies in the development of legal philosophy is very interesting. Sir Henry Maine, as is well known, has brought forward historical facts to show that Austin's system is not of universal application, yet he accepts it as a good working theory for the legal systems of modern times. Germany, too, has had its historical school succeeding an analytical one, but with this difference, that the former was not content merely to apply corrections to the old

analysis, but started a new theory of its own. The opposition of the two is typified by the contention between Thibaut and Savigny at the beginning of the present century. But in speaking of Savigny as the founder of a historical school, we must remember that his views upon the origin of Law were little more than conjecture, hence it was to be expected that the next Jurist who was capable of independent thought would reject them. This, indeed, Ihering has done; he returns to the old lines, establishes Law on Force, and reconstructs a system equivalent to that of Austin. It is to be noticed, however, that he carries his results a stage further, and includes in his idea of Law the limitation of the Sovereign power.

With all this before us then, it is impossible to be content to rest finally in Austin's conclusions. The view of Law which Savigny and Puchta adopted, and which was sharply repudiated by Ihering, has received unexpected confirmation from the works of Sir Henry Maine, and the analysis of Ihering himself has led him, upon other grounds, to a point which is far in advance of Austin. That I have adequately employed the material thus placed at my disposal, I cannot say; it must be sufficient if I have done something to emphasise the defects of the current system, and to make the way easier for subsequent enquirers. It will be seen that I lay claim to no originality in the views I maintain. Some of them, indeed, seemed at one time to be my own, but wider reading has shown that they rest on better authority than any that I could give them, and to their proper authors I have gladly referred

them. This will be evident in the course of the work; and there is only one point which I need specially mention here. I have tried to show that there exist sufficient historical reasons for the different views on Law which have prevailed in Germany and in England. This idea I for some time thought to be my own, until, on referring to some notes which I took of Prof. Pollock's introductory lecture last October at University College, London, I found that, however unconsciously I had retained it, it must have been originally suggested by him. I am glad, therefore, to make this acknowledgment to a writer who has shown how happily practical sense and humorous criticism can be combined in the treatment of Law.

In conclusion, I may say that perhaps hardly any idea of Law is likely to be accepted by all students; it is sufficient if each aspect is from time to time brought prominently forward, and so made to influence actual conduct. In the complication of human affairs it is enough for us to give every view proper expression and representation; the blending of them is effected, and the final result worked into the history of the race, by forces which are beyond human control.

Soon after I wrote the above, and when the following pages were already in the publisher's hands, there appeared Professor Clark's work on "Practical Jurisprudence." The view of Law which he has propounded is in some respects so similar to the one adopted here, that I was at first in some little diffi-

culty as to the proper course for me to take. Had that work, indeed, been published a few weeks earlier, I should have thought it necessary either to withdraw or at least to make extensive alterations in my own; as it was, I at once communicated with Professor Clark, and I have to thank him for the ready courtesy with which he recognised the independence of our investigations and left me at liberty to act as I thought fit. Perhaps, then, this explanation will be enough to account for any coincidences between the two works that may be observed, and it will be easily seen that if our results are occasionally the same, the methods I have employed are but too clearly my own.

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CHAPTER I.

JURISPRUDENCE AS A SCIENCE.

CONSIDERING the vast interests which are affected by the system of law that prevails in a country, it is strange that the scientific treatment of the subject should have commenced in England at so late a date, and that its progress should still be regarded with but little attention. Bentham and Austin are generally credited with having made the first efforts in this direction, but the attempts to follow them have been by no means adequate to the importance of the subject. The latter, indeed, is better known as the founder of Jurisprudence proper, and a singular concurrence of events placed him in a position which gave extraordinary weight to the system he propounded, and enabled it for a long time to pass almost without criticism. Of these we may instance the fact that at a period when public interest was being strongly drawn to legal matters he occupied a field of speculation which was almost entirely new, and that he did so in a manner which would have made him conspicuous among rivals, had any rivals at the time existed. He further had the good fortune to be connected with the most distinguished philosophical

writer of the time, and much of his work has been recovered from the notes taken by that pupil. Not a little too of the credit which Austin obtained, was due to the anxious care with which he strove to introduce exactness of thought and expression into a subject which had hitherto been left to vague generalities, and his work not only established the science of Jurisprudence, but created a possibility of introducing some certainty into the other social sciences as well. From this point of view, indeed, it can never be too highly praised, and considering the greatness of the task he attempted and the success he achieved in solving it, the defects which are sometimes charged against his style may well be excused. But the solitude in which Austin was at first left could not continue. His work gradually attracted the attention of students, and from some of these criticism was certain sooner or later to come. This result would, perhaps, have been attained earlier had not Jurisprudence occupied among us a position of insular isolation from which other sciences are happily free. It is strange that although our law is in a condition which calls for continual denunciation, yet, as a people, we believe that our knowledge and treatment of the subject is a matter upon which we may take some credit. There is indeed a tacit understanding that though in many other sciences the most valuable results come from abroad, in this at least we occupy a position to which little can be added by foreign intercourse. Yet, if we consider that continental jurists had been at work for centuries before any systematic attention

was given to Jurisprudence in our own country, and that they avowedly took the Roman law for the basis of their labours, the opinion may not seem paradoxical that we should rather check our speculations by their results, than expect them to receive the Austinian system as a new and beneficent boon. But though much might have been gained by the study of the German jurists, it was perhaps better that the first criticism of weight upon Austin's system should come from another quarter. The best way of impressing its defects upon the English mind was to show that there existed cases to which that system could in no way be applied. This work was done by Sir Henry Maine, first when he explained the legal ideas existing in the Village Community, and next when he reconstructed the primitive conditions of the Irish tribe. The services which he has thus rendered to the science of Jurisprudence are of course invaluable. At a time when the work of Austin seemed by the mere weight of his name to prevent all whisper of doubt, we have the completest proof that his system is by no means of universal application, and that, perhaps, it must only be regarded as a first attempt to arrive at the ultimate ideas of the science. In this state of affairs it seems to be not unadvisable to consider what is the real cause which has hitherto separated our Jurisprudence from the same science elsewhere, and we have now sufficient material at our command to construct such a view of the matter as may assist us also to a better appreciation of the destiny that lies before it. For this purpose I intend to give as clear

an account as within my limits is possible, of the course that Law has hitherto taken; we shall then be able to determine whether the system of Austin, subject to certain limitations, is to be accepted as final, or whether we may not rather hope in the future for a system founded more surely upon the essential elements of Law and capable of a more extended application. So little, however, has the real nature of Jurisprudence as a science been hitherto understood, that some attempt must first be made to vindicate its claim to that title, and to define the subjects with which it deals.

Recent works have shown that we are still in much uncertainty as to the proper scope of Jurisprudence, but there seems to be little doubt that the word ought to denote the science of Law in all its branches, and any attempt to restrict the word to one of those branches should be discountenanced. Thus Austin would restrict it to the science of Positive Law as it is; Professor Holland, again, is careful to disclaim for it any connection with the substance of actual law, and describes it as "the formal science of Positive Law"[1]; while Professor Pollock would abridge the part of this which is merely formal, and urges a greater infusion of Material Law.[2] I shall try to show that there is really no need for this conflict about the word, but that it does and ought to include the treatment of Law from different points of view, and that it is open to each writer to select his own department of it.

[1] *Jurisprudence*, p. 11.

[2] *Essays in Jurisprudence and Ethics*, p. 6.

Every volume which treats of Law with a view to defining its terms, to exhibiting its arrangement, to explaining its principles, and to showing how they may be carried into effect, is a work on Jurisprudence, just as much as any volume which treats of number and space in their various applications is a work on Mathematics. Jurisprudence is the most general word we have to denote the scientific treatment of Law, and there is no reason to restrict its natural meaning. We shall, however, gain the best idea of its various departments by considering the modes in which it has been actually developed. The science of Law exists for the following purposes—

1. To acquire knowledge of it.
2. To effect improvements in it.

Everything, then, which contributes to these ends comes within the sphere of Jurisprudence.

Like many other sciences Jurisprudence starts from a basis of actual rules. This basis is found in existing systems of law. Thus the law of a country may be said to exist at first in certain rules, and these are learnt by heart or recorded in books. At that time a lawyer has a knowledge of law, just as a practical engineer has a knowledge of rules of engineering; but neither can be said to possess any smattering of science. This indeed does not arise until there is a desire to explain the principles upon which the rules rest, and until lawyers and engineers appear who are capable of doing this. Engineering, however, is only one out of many of the practical applications of

mathematics, and this latter science has not been formed by working back from engineering rules, but, having first arisen in a far simpler way, it has come fully grown to the assistance of the practical science. With Law it is different. It has only one practical side, and from a consideration of this Jurisprudence has been formed. It may be difficult, indeed, to say when the treatment of Law has become so refined as to be worthy of the name of a science, and its real progress is of course different at different times and places. We may say that it depends largely upon the influence which the jurist, *i.e.* the legal expert, has upon its improvement; an influence which the Roman lawyers possessed in a very high degree. It was their aim, moreover, to bring their rules more and more into harmony with actual needs, and they turned Law into a science when they discovered, as they imagined, a principle by which this harmony could be brought about, and by which their rules could be explained.

The course adopted by English lawyers has been usually the reverse of this. They may, indeed, ascertain their rules with much clearness, and make them so general as greatly to reduce their number, but to explain the bearing they have on the relations of human life has been quite beyond their scope. An example will make this clear. Few treatises on English law have had such a reputation as Fearne's *Contingent Remainders*, and yet few are at the present day so completely useless. I do not say that in discussing rules it has no allusions to public

convenience, but these bear only a small proportion to the whole matter of the arguments. It is an elaborate and very admirable statement of the highly technical rules affecting certain estates; but with the abolition of the incidents upon which these estates depended, the rules themselves have vanished. They were the product of an artificial system which only waited till the true science of Law was born to be banished to its proper limbo. Now the only subject in Roman law which bears anything like the same proportion to that which the feudal tenures bear to English law is the subject of possession, and it is needless to remark how different is the treatment in the two cases. Each alike has vanished from actual law: the feudal tenures are almost gone, and possession, as equitable ownership, was long ago absorbed in real ownership; but the latter rested upon permanent facts and needs of life, and its rules were worked out in accordance with those needs. While, then, it is possible to present these in a truly scientific manner, we can hardly imagine a future Savigny making his reputation by a masterly exposition of the rules of contingent remainders. I must confess to a certain feeling that Law is meant to serve the interests of the people, and that no treatment of it can be called scientific which does not show how it contributes to this end.

I have said, then, that the treatment of Roman law became scientific as soon as the jurists learnt to explain its principles upon rational grounds. Let us apply the same test to English law. The first systematic exposition of English law which we need

consider is that of Blackstone, but it fell into great discredit with succeeding jurists because of this very want of the scientific element. We must not forget, however, that as a compendium of law it had great merits. It presented the law in a perspicuous and interesting manner, and attached to it a large amount, if not of rational, at least of historical explanation. For this indeed it is not easy to find fault with the author. His object was to enable the laws of England to be known, and in this he may be said to have succeeded so far as it was possible for any man to succeed. There are two ways besides the merely empirical, in which law can be learnt; one is the historical, by showing the historical facts in which it has had its rise; the other the rational, by showing how it is founded on current morality assisted, where necessary, by the principle of utility. I need hardly say that Blackstone was obliged to choose the first mode because the second was impossible. It has been remarked that Bentham was driven to adopt his method through sheer repulsion from Blackstone; but how little this was due to any fault of the latter is clear from the fact that Bentham was compelled to break altogether with law as it is, and deal exclusively with law as it ought to be. Since it was impossible to explain existing practice on rational principles, he preferred to lay down the principles and wait for them to be incorporated into practice. Hence we received from him the principle of utility, with the many applications which he made of it in his plans for the Civil and Penal Code. But it must be remembered

that Bentham was before his age, and however great may be the advantage we have derived from this fact, yet it introduces a disturbing factor in the natural growth of Jurisprudence. The proper successor to Blackstone was Austin, with his Comparative and Analytical methods, followed as he has been by Sir Henry Maine and others. I shall try to justify this remark in the following manner.

Bentham boasted that by his *Fragment on Government* he was the first who urged men to break with the laws of their ancestors and to venture freely on a career of reform. But however necessary this may be at certain times, it is opposed to the real instincts and interests of men. The true course is shadowed forth in Roman history. There we find that the first improvement came from the consideration of the laws of other nations, and only afterwards was it accelerated by the invention of a law of Nature. Thus the comparative treatment of Law preceded its free theoretical treatment. The same course was really taken by Austin. Disapproving of Blackstone's method as much as Bentham, and accepting fully the principle of utility of the latter, he yet felt that something more was wanting to the construction of a science of Jurisprudence. We must know not only what principles and distinctions seemed to Bentham necessary to be incorporated in law, but we must know what principles and distinctions have actually been incorporated elsewhere; and the main reason is, that this very fact of incorporation elsewhere is one of the best proofs we can have of their utility. The

most practical department of Government, perhaps, is that of the Post Office, and I believe that when a new plan is proposed here it is first thought necessary to enquire how it has worked in other countries which have adopted it. We do not often, indeed, go so far as this in Jurisprudence, but remembering that all law is of slow growth, we may well conclude that it is only incorporated into the systems of other countries if it answers to a real need. Now for our purpose it is enough to compare the Roman law with the English, and this is what Austin did.[1] Let us consider, then, more nearly the result of such a comparison.

I have said that the object of the science of Law is to exhibit and explain its ideas and principles in such a manner as to facilitate their acquisition by the lawyer and their improvement by the legislator. As long as we take our distinctions solely from English law and explain them merely by history, we do not enter upon science, for the distinctions and principles may be merely accidental, and the historical reasons may have no reference to utility. If, however, we were to show that these distinctions and principles have a real basis in the wants of the people, we should then treat the law scientifically, and we should work out the Particular Jurisprudence of the country. This at least is the only natural meaning I can give to this phrase. Jurisprudence deals with the regulation of human relations and of human acts in accordance with the needs of men; if, then, we take up a body of law and show how its distinctions are of permanent im-

[1] Austin, ii. 1113.

portance, and how its principles conform to this object, we have a case of Particular Jurisprudence. It is Jurisprudence, for it deals with the law in a scientific manner, and it is Particular, for it draws its conclusions from one body of law only. But if, now, we can compare this with another body of law which is known to be of consummate value, and if to this the scientific method has already been applied, our course is rendered much easier. We need not take every distinction and enquire whether this is of permanent or merely accidental importance; the surest test will be to note whether a similar distinction exists in our model system. I have already referred to the incidents of contingent estates, and many other parts of the feudal system might be mentioned which have no counterpart in Roman law; the probability, then, is that they are of but temporary interest, and that it is sufficient to notice their existence without seeking to justify their utility. Thus, if we take two such systems of law for our basis of observation and note the distinctions and principles which they have in common, this is so good a guarantee of their permanent utility that we may adopt them into our system of Jurisprudence. But it must be noticed that this system is no longer particular but general; more or less general indeed, according to the area of observation, but still general as opposed to particular. Moreover, having once arrived at a system of General Jurisprudence, it is impossible to go back to a system of Particular Jurisprudence; the former is an easier and more satisfactory way of arriving at the results of the latter.

This, indeed, I apprehend is the meaning of Professor Holland when in the following words he summarily dismisses Particular Jurisprudence:—

> The wider the field of observation the greater of course will be the chance of the principles of a science being rightly and completely enunciated; but, so far as they are scientific truths at all, they are always general and of universal application.[1]

The case, then, is simply this, that when the method of General Jurisprudence has once been introduced, no one would dream of going back to the method of Particular Jurisprudence. We shall still have to consider what was the meaning which Austin probably attached to the phrase.

So far I have spoken of distinctions and principles which are to be found in at least several systems of law; but there are certain ideas of a more abstract nature still which deserve special treatment. They are the ideas upon which all Law is founded and the distinctions which lie at the very root of its arrangement. These are enumerated by Austin (ii. 1108), and are said to be the special matter of General Jurisprudence. We may mention among them the ideas of Law, Right, and Duty; the division of Rights into Property and Obligation; and the chief distinctions of each of the latter. These he asserts to be necessary parts of every system of law, and then goes on to say:—

> Of the principles, notions, and distinctions which are the subjects of General Jurisprudence, others are not necessary (in the sense which I have given to the expression). We may

[1] *Jurisprudence*, p. 9.

imagine coherently an expanded system of law, without conceiving them as constituent parts of it. But as they rest upon grounds of utility which extend through all communities, and which are palpable and obvious in all refined communities, they, in fact, occur very generally in matured systems of law; and therefore may be ranked properly with the general principles which are the subjects of general jurisprudence.[1]

We thus see that Austin makes a distinction between those subjects which are necessarily found in all systems of law, and those which, as a matter of fact, are usually found there, and this distinction really corresponds to two divisions of the subject. The ideas and distinctions which are enumerated above are those with which Austin especially deals, and as they constitute the basis upon which the Science of Jurisprudence is founded, they may not improperly be set apart for separate treatment.

If now we turn to Professor Holland's work, we find that this, covering Austin's ground and also much besides, is called by its author General Jurisprudence. Another authority, too, Professor Pollock, recommends that part, at least, of what is peculiar to Austin should be dropped. He says:—

The two chapters on the various usages of the word *law* might perhaps bear to be yet further shortened; I should doubt, indeed, whether their subject is properly within the scope of jurisprudence.[2]

Why should we not reconcile these conflicting authorities by recognising two departments, the Pure and the General? This will perhaps appear more plausible after the following considerations.

[1] ii. 1109.

[2] *Essays*, p. 9.

I have said that Professor Holland sets down Jurisprudence as the formal science of Positive Law; and Professor Pollock has pointed out how he really leaves this ground and undertakes in places the exposition of actual English law. He then says that Jurisprudence must always vacillate between two extremes; it is to be a mere theory of legal classification, a catalogue of blank forms; or if it undertakes to illustrate these blank forms, it will tend to become an exposition of some particular system.[1] But the real mistake, I think, has been in stating that Jurisprudence is merely a formal science. Pure Jurisprudence, as I have defined it, may be a formal science, but General Jurisprudence certainly is not. Its object is not only to arrive at general distinctions, but at general principles. Thus prescription is a means of acquiring property both in English and in Roman law. This, then, is properly pointed out in General Jurisprudence, and its meaning explained; the actual number of years, however, required for prescription is not touched upon. But Jurisprudence does not stop here. Austin says that Particular Jurisprudence is the only practical Jurisprudence.[2] I have, indeed, already pointed out that this is a form of the science incidental to its early stages, and to which it is impossible to return. What, then, is really the department of mature Jurisprudence which corresponds to it? This will be clear if we remember that, as Professor Pollock says, the best way of showing the value of Jurisprudence is to exhibit its application to a particular system of law. This

[1] *Essays*, p. 6. [2] ii. 1112.

remark shows us at once the object at which we have continually to aim, and gives a name for this part of the science. We return from the study of General Jurisprudence to apply the classification we have invented, and the principles we have discovered to a particular system. We do not now merely take our examples from it, but we go methodically through it. By our just arrangement and rational explanation we impress it on the memory, and in the same way we discover its gaps and its absurdities. Let this, then, be held as the aim of all our work, and let the science in this form be called Applied Jurisprudence. We shall then have an abstract and a concrete form of the science. To Pure and General Jurisprudence will belong the discussion of the most general ideas and the study of classification and of general principles. To Applied Jurisprudence belongs the application of this classification and of these principles in the exposition of a given system of law, and this for the double purpose of learning the law and of improving it.

The development of Jurisprudence, then, is briefly as follows:—

1. The unwieldy mass of the law produces a desire for simplification. This is done by arranging it as clearly as possible, with the assistance of historical explanations.

2. These explanations not sufficing, it is compared with other systems, and certain common distinctions and principles are detected. These are assumed to

have a more permanent value than others: they are said to be in accordance with Nature.

3. At length it is discovered that these only differ from the rest in that they clearly follow the principle of utility. Henceforth, then, we can provisionally guess that this principle is satisfied by comparing different systems; but when this method fails, we can apply the principle directly.

4. Fortified now with the results of General Jurisprudence, we return to the point from which we started, the law of a particular country; and it is our object, by means of Applied Jurisprudence, to secure a systematic exposition of this law, in such a way as shall enable it to be easily acquired and to be easily adjusted to actual requirements.

Indeed Austin, narrowly as he limits the scope of the science, cannot escape the fact that one of its chief objects is the amendment of the law. The best proof of this is that he goes so far out of his way to establish the test by which amendment should take place; but he also expressly notices that no rational exposition of the principles of law can be attempted, without at the same time exhibiting its deficiencies.[1] In the following pages we are concerned mainly with a portion of Pure Jurisprudence as it has been defined above, and I have taken up this subject in order to ascertain the bearing which recent historical investigations have upon it, and also because it may be useful to point out the real differences that exist on this

[1] ii. 1113.

matter between the German and English schools of Jurisprudence.

I may, then, state somewhat more exactly what I conceive to be the special subjects of Pure Jurisprudence. I have said that they are those fundamental ideas and distinctions which underlie all systems of law, and hence we have to consider—

1. The nature of Law.
2. The nature and fundamental distinctions of Rights and Duties.

Professor Holland, commenting upon the different meanings of the words which, in Continental languages, correspond to our general term Law, shows how they denote indifferently Law, or Rights, or Justice. To this fact I shall have occasion to return later on. Here I wish to consider what is meant by saying that Jurisprudence may be "the science of any one of three things—

(1) of Law,
(2) of Rights,
(3) of Justice,"[1]

and that before we can expect to get any accuracy in the treatment of the science we must determine rigorously which of these three ideas shall serve as its basis. But this is really another attempt to introduce into the science that narrowness of purpose which I have deprecated above. As to the distinction between the first two, we need hardly trouble our-

[1] *Jurisprudence*, p. 12.

selves. Law and Rights are so intimately connected that the science of one must necessarily be the science of the other. In any arrangement of the law it is impossible to separate them. It may be convenient, indeed, to begin with law and its various divisions; but when we come to deal with these divisions in detail we inevitably fall back upon Rights—at any rate, in Private Law—as our basis of arrangement. We have only, then, to consider whether there is such an irreconcilable difference between Law and Justice that the latter must not be mentioned when we are treating of the former. It is, however, at least an admissible theory that Jurisprudence is the science of Justice so far as the attainment of this depends on Law. I am aware of the hazardous nature of the attempt to introduce this element into a volume dealing with law, and I should hardly venture to do so did I not seem inevitably drawn thereto by the inadequate explanation of its nature and object which has been given by modern writers. The following remarks will explain the view which I propose to take. In a very interesting note to page 275, vol. i., Austin discusses the maxim of Hobbes that "no law can be unjust," and then states the meaning of the abstract word *justice*. As to the former part, I need say little. If Hobbes meant that "no *positive* law is *legally* unjust," it is a pity he did not say so; but even then this would be a glaring misuse of the word *unjust*. Upon Austin's definition of the word *justice*, however, more attention may profitably be bestowed. His main point is that the word is one

of varying import; everything depends upon the test by which we determine whether a thing is just or unjust. Here, then, it is convenient to introduce that *deus ex machinâ* of which our author makes so much use—the Law of God. Justice is that which conforms to the divine law. This, of course, prepares the way for the next step. The divine law, which is merely our old friend the Law of Nature in very transparent disguise, is known by conformity to the test of utility: hence justice is that which conforms to the test of utility. Now, the first thing I protest against is the apparent certainty here given to the idea of justice. As soon as any one can state with accuracy what is the divine law, or what is positive law, in any given case, then let justice be nailed down to this certainty if any one desires it. Meanwhile, it is a pity to rob a word of its meaning in order to throw over it such a very flimsy cloak of exactness. In the next place, I wish to point out that justice has no immediate connection with any divine law or any test of utility whatever; its immediate appeal is to the emotional nature of man, and the only connection between justice and utility is, that the emotions which are aroused by the former (or its reverse) gradually adapt themselves to the dictates of the latter. The whole system of Hobbes, and that of Austin which is founded upon it, rests upon the supposition of a sovereign armed with illimitable power. There is, however, another power to which few sovereigns have ever dared to oppose themselves, and that is the sense of Right which resides in the people at large—in other words,

the national conscience. If, then, I take this as the test to which all law sooner or later must conform, it is for the purpose of giving once more a meaning to the word justice that shall be, to some extent at least, compatible with common usage. The whole progress of the development of law shows that it is most reasonable to regard it as resting normally upon public opinion for its basis of support, and only exceptionally upon the sovereign power. Whatever obscurity there may at first seem to be in this view I must hope to clear up in the course of the work. So much it has been necessary to say in order to prepare the way for a somewhat new method of viewing the objects of Jurisprudence.

I have hinted above that I have small respect for the manner in which Austin introduces the phrase "Law of God." Such a law is either existent or is not existent. In the former case it only concerns us if it has been revealed; and then it is, as is well known, confined to a few generally received rules of morality. But to apply it to the most perfect rules which may hereafter be introduced for the distribution of property is at variance with all reason. Of what use is it to speak of such a law, when we never expect it to be revealed to us, and when we can never do more than guess that we have discovered it? Let us grant, if necessary, that the foundations of morality rest on revealed religion, but do not let us cover a practical disbelief in this by extending the phrase Law of God to all conceivable matters about which men may make laws.

In brief, then, a sovereign may make laws with direct reference to utility, and enforce them against the conscience or opinion of the people. This, however, is opposed to all modern practice in government. Law is made in accordance with public opinion; and this may or may not have been formed according to the principle of utility. Here, if anywhere, we may use the motto "*Vox populi, vox Dei*," to assist us in our passage from the ideas of Austin to a more practical method of thinking. The primary test of law is not any supposed divine law, but popular opinion: and it is only where, from the nature of the case, this does not exist, that we can have recourse immediately to the principle of utility. For this purpose we may compare the State to an individual, and then we see that Austin makes the very mistake as to legislation which he urges the individual to avoid in his own conduct. He is only to refer immediately to the test of utility when moral rules, or the dictates of his conscience, fail him: so the sovereign power should only resort to the same test when the dictates of the public conscience or of public opinion afford no guidance. I assume here that the sovereign is identified in interest and opinion with the people: the necessary qualifications that must be made in actual life I shall consider in the sequel. Just, then, as the individual makes rules for his own conduct, sometimes by direct reference to conscience, sometimes after first consciously forming an opinion, so the sovereign power sometimes legislates directly in accordance with public opinion, whether this is

formed unconsciously or after a lengthened period of discussion, and sometimes, when this method fails, it may appeal directly to utility; though even here the new law is justified, not on mere grounds of utility, but because this is the test to which public opinion will surely adapt itself sooner or later. I differ, then, from Austin simply in this, that I make public opinion, and not his pretended Law of God, the test to which all law must conform; and when this opinion cannot be directly ascertained, I take utility as the guide to it. It seems to me that this method of looking at law is in accordance with the facts of very ancient and of modern life.

I was led to make the above explanation in considering Professor Holland's dictum that Jurisprudence is the science of Law or of Justice, but not of both. I should rather say that in any scientific work on Law the two should never be entirely separated. This proposition will not be assented to if we regard Jurisprudence as merely a science for the purpose of classification, but I have already tried to show that it has a wider object than this. The principles of law must be presented in such a way as to show that they either do or do not conform to the principle of utility, for in a scientific work we should no more appeal to Justice directly than in Austin's system we should appeal to the Law of God. We may at this point, indeed, see the advantage of having a distinct place assigned to Pure Jurisprudence; it is here that the real relation between Law and Justice should be discussed; when we

emerge from this elementary stage and pass to General and Applied Jurisprudence, as defined above, we need no longer refer to Justice directly any more than we refer to the Divine Law directly; when it is necessary to justify a principle we may, as I have already shown, do this either by demonstrating its utility or referring to its general adoption.

Again, we must remember that Jurisprudence is closely allied both to Morals and to Politics. Since, then, when we enter upon the proper subject-matter of the science it is improper to refer to either of these, it is all the more important to have a special branch in which the limits of Jurisprudence may be accurately defined, and in which we need be under no sense of obligation to pass on hurriedly to more practical matters.

It is the business, then, of Pure Jurisprudence to examine the relation which Jurisprudence, or the science of Law, bears to Ethics, or the science of Morality, and to Politics, or the science of Government. But the connection between Jurisprudence and Politics may exist at three points. We may enquire how the State assists in making law, in ascertaining law, and in sanctioning law. It would seem then that the principles and methods of legislation make an essential part of Pure Jurisprudence, for we cannot ascertain the relation of Law to Justice without discovering the principles of Legislation, or the relation of Law to Politics without discovering its methods. Hence we may exhibit the proper subjects of Pure Jurisprudence in the following manner:—

I. Law, its definition and explanation, and herein—

1. Of the relation of Jurisprudence to Ethics.
2. Of the relation of Jurisprudence to Politics.
3. Of the fundamental principles of Legislation.

II. The different departments of Law.

III. The nature of Rights and Duties.

It is only after we have examined into these matters that we are able to advance further in the science of Jurisprudence, to expound the principles and distinctions which prevail generally in most bodies of Law, and to facilitate the knowledge and improvement of particular bodies of Law. In the following pages we shall be concerned with a portion only of the subjects here enumerated, and I shall attempt to discover the most general meaning which may properly be given to Law and the relation which it should bear to the other sciences just mentioned. Before commencing this, however, I shall offer some remarks upon the origin of rules of Law, on the assumption that Jurisprudence, to define it in full, is the science of the attainment of Justice by means of rules of Law.

CHAPTER II.

LAW AND EQUITY.

THERE is a well-known distinction between sciences, founded upon the certainty with which their principles are arrived at by induction, and the facility with which they can be then employed deductively for the establishment of rules to govern future cases. Mathematics, of course, furnishes us with the best example of a science which passes easily and rapidly through the inductive stage, and whose chief interest lies in the deductive processes to which it is applicable. Its two elementary branches are Algebra and Geometry. The ultimate ideas of these are number and form, ideas which are derived from the experience of everyday life. These ideas, translated into concrete shape, are combined in each case according to a few universally acknowledged axioms, and upon this slender but firm basis the whole superstructure is erected. While, therefore, the discussion of these ultimate ideas and of the validity of these axioms is a subject of interest to every one who is anxious to enquire into the reasons of things, to the ordinary student it is immaterial, and he is content to occupy himself with some of the many applications of which the science is capable. Jurisprudence, however, seems

to stand with the social sciences in general at the other end of the scale. The subject with which it deals is infinitely various, and the ideas and the principles upon which it rests are only arrived at after long and tedious enquiry. As we watch the development of Law we shall see more clearly what the process here involved really is, but in order to give definiteness to the following remarks we may briefly describe it as follows.

The object of Law is to regulate the relations existing between men in such a way as to satisfy the sense of Right residing in the community. Originally the interests of the individual members of the community are so united that the law, whether arising gradually by custom or imposed by a natural authority, an authority, that is, which is not due to conquest, produces this result. In course of time, however, the separation of interests and the increasing complexity of human affairs makes this direct appeal to the sense of Right impossible. Hereupon there arise contested cases, and these are referred to the judgment of wise men. At first their judgments represent nothing more than the best opinion upon what will satisfy the common feeling of Right; afterwards they come to form to a large extent the material from which rules of law are framed, and subsequent judgments, being based upon these rules, are thus removed from direct contact with public opinion. It is probable that this is the natural source of the larger part of private law. If, now, the consideration of these rules falls into the hands of men who are

gifted with the scientific spirit, *i.e.* with an intelligent conception of the purposes which the rules are meant to serve, a science of Jurisprudence speedily arises. The position, however, which the science will occupy depends on the manner in which it is studied and applied. It will be best for our purpose to take as an example the development of law at Rome. There the rules, as originally obtained, did correspond to a certain extent with the facts of life; but in course of time there came to be a total failure to allow for disturbing causes when they were used again in practice. Hence we get what are known as strict rules of law. These are simple, definite, and easy to work with; they are felt, however, to produce many cases of injustice, that is, they often violate the common sense of Right, and they produce a general feeling of dissatisfaction. The narrowness of the old *Jus Civile* is well known, a narrowness which was perhaps necessary in the beginning of the science. But the law as thus determined could not have lasted, had not a way been found of reconciling this strictness with the needs of life. The remedy lay in the practical sense of the Roman jurists. A simple example from another science will make this clear. A rule of gunnery is founded originally upon certain dynamical formulæ obtained by applying algebraical and geometrical processes to problems whose physical basis consists of the elementary laws of motion. But no one dreams of taking the rule immediately from the equation to the parabolic path of a projectile. It is known that this would produce a wrong result. It is recognised

that the equation, though valuable, does not correspond to the path of the cannon ball, and that before it can do so it must be corrected by allowing for the resistance of the air. This seems to illustrate the fact in legal development of which I am speaking. The old rule of law is correct, exactly as the parabolic path of the projectile is correct; it is a valuable foundation on which to build a judgment. But to apply it without correction to the facts of life will in many cases as surely be a mistake, as it would be to point a gun without allowing for disturbing causes. We have, however, this difference. The gunner, while thoroughly instructed in his rule, may be safely left to use his own discretion as well. His one object is to hit the mark, and if he does this with sufficient success no one cares to enquire what rules he has actually worked with. But in Law the mark in each particular case is not so evident. In general we can only tell that substantial justice is being done by considering the average results of a number of different cases. In each particular case then we enquire only what rule has been followed, and the goodness of the rule is judged by the general satisfaction produced when it is frequently applied.

Now when those original rules which are first and most readily obtained, and which we have called the rules of strict law, are used without modification, there is often no satisfaction at all produced at the result. It becomes obvious that those who apply the law miss their aim and work injustice. Hence arose at Rome the necessity for Prætorian legislation

and the establishment of what we may safely call rules of equity. Thus some of the earliest and clearest rules have to do with ownership, with the creation, the transmission, and other incidents of the rights involved in it. The Prætor, then, being called upon to decide some question of ownership, finds that the rules of strict law are obviously at variance with justice. A person has acquired some property by a good title (*justus titulus*) and in good faith, but owing to an informality the legal ownership has not passed to him. Usucaption has commenced to run, and within a year this defect will be remedied, but in the meantime he loses possession of the thing and is left without a remedy. This is a case in which it is clear that the rules of strict law do not satisfy justice. The Prætor introduces an action appropriate to the case, the *Actio Publiciana in Rem*, and this mistake in the application of law is rectified.

The course taken by the jurists proper is somewhat different to this. Equity, if it is to have a permanent value, assumes that there must be rules of strict law, and tries to invent other rules which may be blended with them in practice, that so the ultimate decision may agree with the requirements of life. We have seen that the first rules were obtained by considering what was in accordance with the sense of Right in particular cases. The object of science, however, is to re-examine continually those first inductions upon which the early rules of law were founded, and to see if a more careful observation of facts cannot put them on a broader

basis; in other words, it tries to improve the original rule, as well as to correct its effect by subsidiary ones. An example will make this clear. The original rule as to the acquisition of certain things bound up the ownership of them with the observance of particular ceremonies, and while cases arose only among Roman citizens the result was substantially correct, that is, the intentions of the parties were carried into effect. But when the same system of law came to be applied to other peoples as well, and the number of cases was multiplied, it was found that the legal relation between men which corresponded to this idea could not in justice be thus limited. The rule founded upon the observation of a certain class of cases, *i.e.* upon those in which Roman citizens were the parties, was no longer correct. The transfer of ownership did not in its true essence depend upon the ceremonies of the mancipation, and it was necessary to make an effort to find what were the most general facts upon which it did depend. The Roman lawyers found these to exist in an intention to transfer on the part of the alienor and an actual receipt by the alienee. Law, however, cannot deal with intention; there must be an overt sign. This was found in the existence of a *justus titulus*. Hence, according to the jurists, ownership is transferred when there exists a *justus titulus* followed by *traditio*. One great function of Jurisprudence, then, is to cast about for rules which shall represent more accurately than the old rules the facts of life.

This, however, is not sufficient. The rules of

equity are still required. Long before that more general form is given to the rule there are cases where its strict application works positive injustice. This was remedied by the Roman lawyers, by the liberal allowance of a *jus singulare*. Of this I shall speak more fully later on; it will be sufficient here to refer briefly to the method. When the Roman jurist had his attention drawn to the apparent wrong that would be inflicted by applying a rule of law—*i.e.* when judgments founded upon it would miss their mark and be unjust—his first enquiry was as to the importance of the case in question. It is a choice of two evils. If the case is of rare occurrence it is better to let the law take its course. The advantage of definite rules of law, and the objection to the indiscriminate multiplication of them, are too great to allow of continual deviations. But if the case is one of a large number, and calls, therefore, for a remedy, the jurist makes an exception; he creates in this case a subsidiary rule of law, which is really a rule of equity; he calls it a rule of *jus singulare*, and states that it is allowed "*causa utilitatis*." The work of extending the original rules, however, still goes on, and in course of time the rule of *jus singulare* is often included in the improved rule of law.

We thus see clearly the successive stages in the development of law. At first it is purely empirical; the decisions of the original arbitrators or judges are based upon direct observation of facts; in other words, upon an immediate perception of custom, or of the justice of the case. It next passes into the

early scientific stage: rules are formed, but these are only approximate. At first, probably, allowance for this is made in practice; and as their defects are thus not noticed, no objection is taken to them. Soon, however, the value of definite rules is discovered; the judge's discretion is withdrawn and the strict law is applied. Hereupon cases of injustice are apparent on all hands, and it becomes evident that mistakes in the regulation of rights are being made. The remedy is at first applied sparingly, and the Prætor introduces rules of equity with a grudging hand. Then, happily, comes the era of the great jurists. They see that Jurisprudence has a double function; it must continually strive to set the rules of law by truer and more extensive inductions upon a sounder basis, and till this can be done it must consider what cases are sufficiently important to deserve immediate aid by means of *jus singulare*, or by a rule of equity.

There are, moreover, rules of equity of a somewhat different character, rules which can never be included in the regular rules of law, but are intended to correct those disturbing influences which sometimes occur. We may illustrate this by our former example. The mathematician gives to the gunner a calculation of the path of a projectile, taken from pure dynamics. In applying this the gunner finds he is perpetually wrong, and he gets into the way of making a special allowance each time he uses the rule. This, if approved by the mathematician, corresponds to a rule of law corrected by rule of *jus singulare*. In course of time, however, the mathe-

matician sees how to alter his work so as to allow for the resistance of the air. He now gives the corrected rule to the gunner, and upon the latter following it the desired result is obtained. Here we have the rule of law amended so as to include the provisional rule of *jus singulare*. Some day, however, the gunner finds that his aim is completely wrong, and this is due to a high wind which is blowing at the time. He now finds himself compelled to use his own judgment once again; and, on appealing to his scientific guide, he will be told that although the original rule cannot be altered to suit this occasional need, yet a distinct formula may be given by which he can allow for the force of the wind when necessary. This seems to represent the case of those rules of English Law which have grown up in courts of Equity, and which regulate the effect which fraud, mistake, etc., shall be allowed to exercise on legal decisions. We thus have a triple division of legal rules. There are the rules of strict law, which have been adapted as nearly as possible to general requirements; as, however, this adaptation is never perfect, they are supplemented by the introduction of temporary rules of Equity. It is characteristic of these that they are not intended to be permanent, but are merely kept as singular rules till they can be included in the more general ones. Many of the rules hitherto made by courts of equity as to trust estates seem to be of this kind, and they disappear as it is found that the ordinary legal rules of ownership must be applied in these cases also. And finally, we have permanent rules of Equity.

These refer to matters which cannot be allowed for in the general rules; they are only of occasional occurrence, and their effect must be specially calculated. This division seems to afford a sound distinction between Law and Equity.

Every science exists originally in its pure form. Only by long experience is it possible to use it accurately in practice. Hence Law begins with the *jus strictum*. How long it will remain in that stage depends on the capability of the lawyers for realising the real relations of men, and their desire and power to satisfy general needs. We may say that the natural division of labour occurs here also. There is room for the jurist and the judge: the former collects from reported cases, from customs, and perhaps from other sources, the rules of law which the judge is to use; the latter, in using these, notes continually whether substantial justice seems to be done, and reports to the jurist. When, then, this last is satisfied that cases exist in sufficient number and of sufficient importance to justify a departure from the law, he grants a rule of *jus singulare* for the immediate use of the judge, and sets to work to consider whether this is to be only temporary or whether it is to be permanent. If the former, he extends the rule of Law as speedily as possible so as to include it; if the latter, he reckons it as a permanent addition to the rules of Equity. Both of these are in the hands of the jurist, but each belongs to a different part of his science. The former may be said to be the subject-matter of Pure, the latter of Applied Law. The improvement of Law

depends, on the one hand, upon the skill of the judge in noting the real state of the relations that come before him for decision, and the effect of his judgment upon them; and upon the other, on the readiness of the jurist to extend his rules of Law and increase his rules of Equity.

It must be remembered that we are now considering Jurisprudence as a science in the hands of experts entirely. This was a condition to which it very nearly attained at Rome, and which it has to a certain extent possessed in England. With us, however, the business of the jurist and of the judge has usually been blended, and the science has been developed not in the seclusion of a school, but amid the distracting business of the courts. There is now, moreover, a growing disinclination to make new rules or alter old ones, and this business is unhappily thrown more and more upon the legislature. Legislation, however, never has been equal to the work thus cast upon it; and we must amend this state of things either by vastly increasing the resources of Parliament or by allowing more authority to the work of jurists.

But in all probability Parliament will never be able to do more than settle broad questions of public policy, and decide the manner in which rights shall be divided between conflicting classes. If the details are ever to be satisfactorily arranged there must be a regular science of Law, and means must be devised for ensuring to its *dicta* a general assent. The idea may be said to be chimerical, but the world only improves by the gradual realisation of chimerical ideas.

CHAPTER III.

THE INDUCTIONS OF JURISPRUDENCE.

We have been regarding Jurisprudence as a science which has for its ultimate aim the ascertainment of rules which shall regulate human relations in accordance with the common sense of Right. The course pursued by it will be the same, then, as that pursued by every other science; by successive abstractions from similar cases it will arrive at general principles and ideas; in applying its rules to actual life again it will allow, as far as possible, for the elements which have been dropped; and for it, as for every other science, the great means of improvement will be verification. Let us examine more clearly what this means.

The ultimate object of every practical science is the making of rules which shall guide the actions of men. At first men decide their future acts by a direct reference to past cases. At this stage there is no science, the decisions are merely empirical. Then in a certain number of past cases, a common element is seen, and we infer that what has held good in the past will hold good wherever this common element is found in the future. In other words, we make a rule, and we have now the beginning of science. The

detection of the common element, and the inference that it is this which influences the cases, is a process of induction; the result is to lay down a principle which shall govern future similar cases. These principles are, however, as yet in an embryonic state. The induction is founded upon the observation of a very few cases, and we are by no means sure that the rule we have obtained will cover the next case apparently resembling them. It may be that the element which we have detected is really the common element, and that it cannot be resolved into anything more general. All future cases, then, will certainly contain this element in its entirety, and our reasoning, so far as it is founded upon its existence, will remain universally true. In this case we have a complete induction rapidly formed; the science passes at once into its purest condition, and we may henceforth make free use of it for purposes of deduction. Such is the case with the sciences of Algebra and Geometry already referred to. The common elements of number and form upon which they are founded admit of no further reduction; wherever, then, these are present, the rules founded on the science may, so far as these elements are concerned, be applied with certainty. When, however, we turn to Jurisprudence, we meet with a very different state of things. To what extent may we call this a science, and to what extent is it a pure science properly so called; a science which is established upon perfect inductions, and whose principles, therefore, may be freely applied by way of deduction? It may not be improper to point out here, for indeed the

fact seems to have been too much overlooked, that the great instrument in the science of Jurisprudence, as in every other science, is verification. Now there are two points at which error may creep in—first in making an induction, and next in modifying it again for actual application to the facts of life. In either case if an error has been made we shall become aware of it by the happening of some evil. We may say that all the practical sciences have for their object the making of rules whereby men may avoid future evil. When, therefore, we have pretended to apply the rules given by a science and yet are confronted by evil results, we know that a mistake has been made. How is it, then, that in Jurisprudence men are so careful about the rules and so little anxious about the evils that result from them? What would be thought of the science of Astronomy if it persisted in applying antiquated rules for the calculation of sidereal phenomena, and if the world time after time set itself to watch in vain for a transit of Venus or an eclipse of the Sun? Its professors would be scouted as impostors; the science itself would be overwhelmed by the school of Carlyle with abuse not here to be hinted at; and Astrology would soon have a companion in the limbo to which it has been consigned. It may be useful to examine this point more carefully by considering the two places just mentioned at which error may creep in; but as a mere playing with general terms is waste of time when a science is still in an elementary condition, I shall try to give as much definiteness to my remarks as possible, by presenting actual cases in the development of law.

I have pointed out that Law enters upon the scientific stage when men try to decide contested cases by an observation of what has satisfied the common sense of Right in similar previous cases. This will become more clear when we have traced the early development of Roman law at length. The rules gradually group themselves round some one continually recurring relation, and this is elevated into a legal institution. The most general of these are property and contract. We rise a step higher when we ask upon what these institutions rest, and enquire into the nature of Law with its various related ideas. These, then, as I have already said, form the ultimate subject-matter of Pure Jurisprudence, and it is to their elucidation that the modern analytical school has specially devoted its energies. But as these institutions have arisen gradually by the introduction of one rule after another that gives to them more and more definiteness, so they are useful in practice only as we deduce from them the same or similar rules. These, as I have pointed out, are rules of strict law. But assuming for the time that such rules, so far as they go, are really true, and that they do correspond with the opinions and practices of the greater part of the community—in other words, that their application will satisfy the common sense of Right—we must still remember that they are not fit for actual use. They are rules of a pure science which have been arrived at by dropping many of the facts of actual life, and they cannot be used with safety except by help of an applied science which has for its special object the reintro-

duction of these facts. We have already examined this point, and we have seen that it is the special business of rules of equity to reintroduce those considerations which have been dropped in arriving at the rules of law.

Thus, in calculating from the theory of dynamics, the path that a cannon ball will take, in order to get a correct rule for the elevation of the gun, it is a matter of no small difficulty to reintroduce that resistance of the air which was omitted in framing the laws of motion, and at best only an approximation to this can be made.

The same is true also in Economics. In applying the principles of this science to cases of actual life, our results will be totally wrong if we omit to take account of those principles of morals (including thereunder customs) which really affect the conduct of men, but have been dropped in arriving at the economical abstraction. Thus, given a particular rate of increase of population, a particular rate of increase of production from the land through the application of capital, and a limited amount of land; with these or similar data the economist would be able to deduce, with some accuracy, the point to which the rent of the land would rise or fall, the profits which capital would ultimately receive, and the limit at which the population would arrive before starvation, if no other check was devised, began to do its work. But we at once see that these results, though doubtless not without their value, would yet be untrue for real life, because they would fail to include that large body of

moral considerations by which the conduct of men is so powerfully affected. If, now, we enquire what are the consequences of errors made in omitting to prepare a pure science by means of the corresponding applied science before using it in concrete cases, we see that these are invariably produced in the form of some calamity to those who employ the rule or to others in some way connected with them. Thus a rule of engineering into which the strength of wood and iron has not been correctly introduced, or the force of an extraordinary wind not allowed for, may bring wholesale loss of life and destruction of property. A rule of Economics, which is true for full-grown and flourishing communities, may, if embodied in legislation, bring commercial distress and wide-spread misery to a young colony or an antiquated state. And this kind of error is not unusual in Law too, and there it is attended by its consequent evils, though not to the same extent as those other mistakes which we shall shortly notice.

Thus it has been remarked that the object of Law is to carry into practical effect that sense of Right which is felt, if not by all, yet at least by the vast majority, of the individuals of a community. Now a principle of law is obtained by considering a number of similar relations existing between these individuals, or between these individuals and the things, *i.e.* the pieces of non-human nature, whether animate or inanimate, by which they are surrounded. By fixing our attention upon some one aspect of these relations we arrive at an abstract idea, such as that

of ownership, and then, working from this as our basis, we obtain a number of rules relating to ownership which correspond more or less accurately with the sense of Right existing on the same subject in the breasts of the living individuals. If, now, we proceed to put our rule into action immediately, without any attempt at qualification, we shall certainly work a vast amount of injustice. In other words, the legal ownership is often different from that which the expectations of the parties requires. Were, then, the person charged with the actual working of these rules gifted with adequate knowledge and adequate power, he would rectify this by accommodating the rule to each particular case; and sometimes, when the injustice that would be perpetrated is very gross, and the power allowed to the judge—for such is the officer in question—sufficiently large, this is actually done, and hence arises the whole equitable doctrine of trusts, of fraud, of mistake, etc. But owing to the spread of ideas which we need not enumerate, this finally becomes impossible. There is then nothing to be done but to apply the strict rule of law; instances of petty injustice abound, and unless some remedy is devised the punishment comes in a general suspicion and distrust of the whole legal system. We may briefly recapitulate the results at which we have arrived, as follows:—The process of applying the principles of abstract science to cases of actual life, consists in filling in as accurately as possible for each particular case those details which were omitted when we arrived at the abstract principle by the consideration

of a number of other similar cases. In Mathematics this is done by taking account of such things as friction, resistance of fluids, strength of materials, etc., and we have the result in rules of gunnery, of engineering, and so forth. In Economics this is done by reintroducing those moral and other considerations which have been omitted in forming the abstract principles of the science, and we have the result in rules of dealing between man and man, or nation and nation, which may be adopted either by individuals for their own guidance, or by nations in the form of legislation. In Law this is done, or rather, if the agents of law were sufficiently able, should be done by reintroducing those actual relations between individuals which have been dropped, indeed, in forming the rule, but which go to make up a very considerable part of the common sense of Right. When in any of the above sciences this correction is not made there results calamity, or at least inconvenience, which is continually tending to calamity. Mistakes in the rules of applied mathematical science bring us, with our errors, face to face with physical nature, and the result is certain disaster. Mistakes in the application of economical science bring us face to face partly with physical nature, partly with the outraged moral nature of man, and from one or the other source retribution will certainly come. Mistakes in the application of Law bring us face to face with a widespread feeling of injustice and indignation; and this may, in extreme cases, have consequences more disastrous than in either of the preceding examples.

It must be remembered that no allusion has been made to mere errors in calculation. These do not enter into our sphere. Thus a captain may mistake his longitude, or a judge the meaning of his rule of law, and the consequences will be as bad as though the rule itself were improper for practical use. It is clear, however, that this kind of error is to be avoided by the proper selection of agents to work the rules, and calls for no special discussion.

Assuming, then, that our rules of strict law do actually correspond to certain facts in real life, the process of using them to form a judgment consists of two parts. We first use the rules themselves by way of deduction, according to the ordinary processes of logic. To do this correctly merely requires, as I have just said, some one who is skilled in the knowledge of the law, and who can reason correctly. Mistakes do not, as a rule, arise from this source. But it is not sufficient to argue correctly on this basis; we must modify our rules of law by rules of equity. This process is of course well known, but its real significance is very often not grasped. In Rome the making of these rules was the work of the Prætor and the Jurist. In England it has been hitherto the work of the Court of Chancery; hence, as I have before remarked, the rules which have grown up with regard to trusts as affecting property, and fraud and mistake as affecting contract. But the power of Courts of Equity has no firm foundation. They lose in course of time their immediate outlook into real life. Their rules remain valuable indeed as the substance of Applied Law, but

they have lost the power of producing new ones. Equity can now be improved only by the Legislature, and the fear of the elasticity of the Chancellor's conscience makes us practically forego the benefits of this method of legislation. It is not difficult to see how recent disputes as to ownership, affecting large classes of persons, would never have arisen had the opportunity or the desire of making rules of equity been in the hands of those who had the administration of the law. The doctrines of specification and of trusts consistently applied, would have regulated from the beginning rights which have since become the battle-ground of factions. I shall try to show later on, that a sanction is not of the essence of a law governing human relations. It is a mark of the second, not of the first order. But in the vast complexity of human affairs it is necessary that many of them should be regulated by general rules. When, however, the determination of these rules is left to the strife of political parties, this is often merely a sign that Jurisprudence has either neglected, or been hindered from doing, her proper work. It is a matter, indeed, involving problems, whose solution demands all the efforts of the students of Jurisprudence continued through many generations. There has been hitherto one such school in the world, the school of which Papinian, Paul, and Ulpian are the brightest ornaments, and the influence it has had is sufficient proof of the truth of what we are urging. Sir Henry Maine said many years ago, that the great importance to us of the Roman Law lay in the fact that we

approach in our own law nearer and nearer to its conclusions; but we can only do this consistently as we copy the method of the Roman Jurists themselves, and as we see that rules of law are the result, not of an agitation, but of a science. We may, indeed, congratulate ourselves that we have the Roman Law as a model, but it is not our goal. The improvement in the definition of ideas, and the change in human relations, make it impossible for its decisions to satisfy us in all points. Our motto must be that put forward by Ihering, "Through the Roman Law, but beyond it;" and if we can use the same methods in thus going beyond it, which the Romans used in making it, Jurisprudence may again have the most beneficent effects upon human society.

So far we have been considering the error that may arise when we apply a rule of law, correctly indeed, but without allowing for those equitable considerations which alone make it tolerable in practice. We have assumed that the rules and principles of Pure Law do really correspond to actual facts in the legal relations of men, and that they may be correctly applied over the whole area where systems of law based upon them are in force. In pointing out that this correctness may be entirely wanting, and that the gravest miscarriages of justice may thereby occur, I am of course only repeating the criticisms which Sir Henry Maine has from historical considerations bestowed upon the Austinian analysis. Since, however, this is of the greatest importance for my argument, I shall take some trouble to make the matter perfectly

clear, and to determine what is the real effect of this error upon the science of Jurisprudence. I shall follow Sir Henry Maine in making a comparison here, as I have done before, between Jurisprudence and the sciences of Mathematics and Economics.[1] The science of Algebra, which is the best example of a pure science, is founded upon one element only, that of number. Wherever, then, in nature there exists a separation of parts, either in reality or in idea, there we may apply the science of Algebra without fear that our results will be incorrect so far as they are founded merely upon the numbering of such parts; for indeed the uniformity of our experience with regard to number in the past, leads us to conclude that the same will hold good for the future, with a force of conviction which has very generally led men to attach to the results of Algebra (and also of Geometry) a necessity which transcends the sphere of experience. But this, of course, merely means that wherever in space or time there may be found to exist bodies similarly capable of separation into parts, or, in other words, endowed with the quality of number, these results will be true with regard to them also. The value of Algebra as an abstract science consists, then, in the fact that its one constituent element is always present in those cases to which we wish to apply it. We may say, indeed, that the one test in the case of a new science, such as Political Economy, which seeks to call in Algebra to its aid, is whether the facts about which it treats contain the element of number, and only so far as they do this are the results founded

[1] *Early History of Institutions*, p. 360.

on Algebra correct. If, now, we proceed to apply the same test to Economics regarded as a pure science, we see at once that it lacks this quality of universality which is possessed by Algebra. Taking a general view of a large number of cases in which commercial intercourse goes on between man and man, it abstracts from them the principle that man in such intercourse is guided by the desire of making as large a profit as possible. Of course I do not mean that this is the only ultimate element in the abstractions of Economics, but it is a very important one. Assuming, then, the existence of this element, and combining it with others, rules are framed for the purpose of facilitating such intercourse, and, whether embodied in legislation and enforced by the power of the state, or only acknowledged and enforced by public opinion, they become operative in actual life. The tendency next is to apply these rules, based upon our experience of that portion of mankind with whom we are best acquainted, and to whom, owing to the allowances that have been made for other considerations, they really are applicable, to other portions of mankind of whom we know little, or at least with regard to whom we overlook the fact that this ultimate constituent element is wanting, and is indeed replaced by another. This occurs, as is now universally recognised, when we apply our doctrines of Economics, founded upon the fact above mentioned, to races of men who are governed in their commercial intercourse little if at all by the desire of gain, but almost entirely by the force of custom. We see then that the differ-

ence between Algebra and Economics exists not in any supposed necessity in the one, as opposed to the want of it in the other, but in the fact that all the cases to which we usually apply Algebra really contain the element upon which it is founded, while many of the cases to which we apply Economics are found to be wanting in its ultimate element, as at present understood, and so our results are vitiated. So far, however, as that ultimate element really does exist in actual cases, the conclusions of Economics are as universally true as those of Algebra; the difference lies only in the smaller number of practical cases to which they are applicable. Economics is the science of wealth, and though we may wish to apply it to the dealings of all mankind, yet as its present abstractions are true of only a portion, we say that it has but a limited, while Algebra has a universal, application. The fact is that Algebra is only universal so far as the cases to which we apply it contain the element of number; and in the same way Economics is just as universal so far as the cases to which it is applied contain its own ultimate element, that is, so far as they are cases of the commercial intercourse of men influenced only by a desire of gain.

We are now in a position to estimate the influence of the source of error which we are considering on the science of Jurisprudence. We have already seen that when our abstract principles are admitted to hold good, mistakes will arise in actual practice, owing to our failure to allow for the less general elements which have been omitted in forming the abstraction. With

such mistakes we are not now concerned, but with those which are made when we apply our abstract principles to cases, in which the ultimate elements upon which they rest are wanting.

Now the ultimate element upon which the science of Jurisprudence, as established by Austin, rests, is in brief as follows:—Law is a command, issued by a sovereign and enforced by a threat of evil to ensue in case of disobedience; by these commands are duties imposed and rights thereby created; and men submit to have their rights and duties regulated in this way. From this ultimate fact in the history of certain portions of mankind, the science of Jurisprudence obtains the ideas of Sovereignty, Law, Right, Duty, and Sanction. When, however, a set of men who are imbued, whether consciously or unconsciously, with these notions, happen to be placed in authority over a completely different race of men, and proceed to put in practice the rules which they have derived from these ultimate elements, they may fall into the most perilous mistakes. The rights of the latter, instead of corresponding to a law issued by a central authority, may correspond to customs which adapt themselves almost insensibly to the requirements of those who practise them; and these customs, moreover, may possess in actual practice a vagueness or elasticity which alone makes them tolerable. The effect, then, of applying to such races the rules formed upon abstract elements of a totally different kind, has been described by Sir Henry Maine. These customs are at once changed into the rigid form of law; the rights

which they confer and the duties which they impose, being bound to assume a definite shape of some form or other, assume one differing very much, perhaps, from that to which those who have been brought up under these customs are habituated; and the result is felt in a sense of violated Right, which ends either in mere individual vexation or in national revolution, according to the character of the people and the strength of the central authority. Of course unless and until such a catastrophe occurs, we may say that the system of law is actually in force, and that it is really founded upon the ideas above mentioned. But the study of Law can surely lay no claim to be called a science, if it is content to have its rules admitted only to this *de facto* position. A mariner may make a wrong calculation and yet not suffer shipwreck; an economist may procure the enactment of a bad rule of trade, and yet produce no widespread distress; a statesman may enforce law which is at variance with the sense of Right inherent in the people, and yet not arouse a revolution. None the less in all these cases has an error crept into the practical operations of the science, and in spite of all the positive laws that ever existed, a mistake may be made in the practical application of Jurisprudence, just as much as in Navigation or as in Economics. The only difference exists in this. The error of the sailor may bring him into contact with the merciless force of Nature, and then his *de facto* rule is seen in its true light, lacking the element of reality: the error of the economist may bring him into contact

with the force of Nature, and also with the outraged nature of man, and, if such be the case, his rule is recognised at once as bad, however great be the authority that laid it down and made it positive. And why then, when we come to the province of Jurisprudence, are we to ascribe that respect to positive rules which is denied in all other cases? Merely because the error, as a rule, ends only in human vexation, a vexation which is seldom strong enough to raise a storm that shall recoil on the author of this positive law, and prove in Nature's own fashion that it is positive injustice, are we, then, to limit the province of Jurisprudence to these positive rules and forbid it to enquire continually if their foundations are correct? Assuredly not. Of course the position I am now assuming stands in need of careful qualifications. The imperfections of human nature require that a strong check should be imposed upon it, and it may be necessary that the sovereign power should retain a more or less direct control over Law; but this is no reason why we should raise positive law to that pinnacle in the science which it now enjoys, and why we should forbid Jurisprudence to set about her proper business, and to seek to regulate the relations between man and man, in such a manner that they may best be brought into harmony with the common sense of Right.

So far we have confined ourselves to considering the substantial injustice that may be done, by applying the Austinian conception of Law to a community which has hitherto regulated itself in an entirely

different manner. It is, of course, merely a corollary from this to point to the effects of applying the other principles of Pure Jurisprudence. As the chief examples of these I have referred to the great institutions of Property and Contract. It is notorious, however, that these have no character of universality, but are of purely historical growth. I need only point once more to Sir Henry Maine's writings, for confirmation of the injustice that may be done when these ideas are applied to a people whose legal relations have hitherto been of a totally different kind. We shall not be far wrong, moreover, in surmising, that much of the bitterness that exists in the hearts of Irish peasantry towards England has arisen from the fact, that the ideas of English Pure Jurisprudence have been applied amongst them in many cases in which they really had no counterpart in the actual relations existing between man and man.

The position then at which we have arrived, and which alone concerns us at present, is in brief the following:—There has been set up of recent years a Science of Jurisprudence which, in its purest form, depends upon certain elements which are assumed to exist in every legal relation between man and man. By abstracting these elements, and subjecting them separately to a careful scrutiny, we are able to grasp them with a clearness which is of the greatest value, when we consider their effect in new and similar legal relations. It must, however, be carefully noticed, that these new legal relations must be similar to the

old ones from which these elements were taken, to such an extent as actually to contain these elements themselves, or at least elements so resembling them, as to avert the chance of serious error arising from regarding them as identical. So far, then, as these conditions are satisfied, this new science of Jurisprudence may be safely used to assist us in actual practice, and the conclusions at which we arrive by its means will be absolutely true, so far as the elements upon which they are based actually exist. In this way, and to this extent, our science of Jurisprudence is universally true, but that it is universally true when applied to a different class of men, is not to be maintained; for here the elements upon which it is based are probably wanting, and the conclusions to which we should be led will conflict with their own sense of Right.

Thus Austin, confining his attention to certain portions of mankind, found in their legal relations certain common elements which he formulated in the above mentioned series of terms—Sovereignty, Law, Sanction, Right, and Duty. Descending then to more particular relations, he found other elements which he examined and described as Ownership and Servitude; and had his task been finished he would have included also Contracts, either generally or in their particular forms. Upon these ideas there was founded a pure science of Jurisprudence, which, owing to the authority attaching to its author's name, was credited with a character of universality, not only for the races of mankind from among whom its data were taken, but

also for the world generally. Happily, however, our experience was extended, and the illusion dispelled, by the works of Sir Henry Maine; for continental writings, though they might have contributed to the same result, have certainly had little influence among us. In early Rome it is probable that there was no central authority at all capable of constraining a member of the confederation. In ancient Ireland it is certain that Self-help was regarded as the proper redress for violated rights, and it is a curious coincidence that in the same country the question of employing similar means should have again arisen. In modern India, until the discontinuity caused by English rule, law was evolved and enforced in each village separately, without any regard to the central authority. And if to this it be answered that the examples offered are those of barbarous or only semi-civilised peoples, we may reply that civilisation is only a relative term; and, assuming that legal ideas tend everywhere to assume the form they now wear in western countries, even the civilisation of these is only transitory, and may develop into a form of society to which the elements of Austin's analysis will be as strange as they would have been to our own savage ancestors. Moreover, an English jurist cannot afford to forget that the science of Jurisprudence does not exist for his own country only, but seriously affects many of these semi-barbarous peoples; and though it may be the duty of a higher governing race to instil some of its own ideas into a lower subject people, yet this can only be done to a limited extent, and in all doubtful

cases, their own sense of Right should be taken as the test of Law.

The great question then which lies before us is concerned with the position which we shall assign to the Austinian analysis. The answer to this I shall not attempt at present. It will be sufficient here to give the question expression, and to mark out the scope of our enquiry. That the strict application of Austin's ideas is out of the question, is of course admitted. The practical carrying out of the idea of sovereignty is prevented by public opinion or by fear of rebellion. Shall we say, then, that the ultimate conception of Law does indeed correspond to facts, but requires to be limited in practice by special modifications, or by a kind of political equity; or shall we say that the idea of Law is based upon a wrong induction and requires to be changed before it is capable of general application at all? In other words, does the error which would arise from a use of Austin's ideas belong to the first or second class of errors that we have enumerated; does it, that is to say, come in through too rigorous an application of a correct principle, or does its source lie still further back, and spring from the incorrectness of the principle itself? To this enquiry it will be our business to address ourselves, and the answer will be deduced from a general consideration of legal conceptions, both in ancient and in modern times.

There still remains, however, one point to be noticed. So far as we have got at present, the science of Jurisprudence has never passed beyond the empiri-

cal stage. I have defined it as the science which has for its object the formation of rules for the guidance of human affairs in such a manner as to satisfy the common sense of Right. But the only method which has been suggested so far for the formation of these rules, is a careful examination of past cases in which this sense of Right has been on the whole satisfied. This, however, as is well known, is a slow process; we want to go a step further. What was the common element in those cases which recommended them to general approbation? If we can ascertain this we shall have a principle to guide us for the future. We need no longer search for the external marks in past cases, and enquire if these are present in a new one. We shall have arrived at the essence of the matter, and being in possession of this, we may strike out a bold course for ourselves. If we can discover such a principle, we shall see the same change worked in the science of Jurisprudence, that Kepler and Newton worked in the science of Astronomy, when they discovered the paths of the planets and the law of Gravitation. Till then an eclipse had been foretold with much pain and labour by a careful comparison of past eclipses. In future only such reference to the past was necessary as might determine the constants in the dynamical equations. For the rest astronomers might safely launch out into predictions, and find these invariably verified by the results. The climax was reached, as is well known, in the discovery of Neptune. Is it possible, then, to discover such a fundamental principle in Jurisprudence, and can we, armed with

this, launch out safely in the formation of legal rules, knowing for certain that their application will satisfy the general feeling of Right? It is well known that two such attempts have been made, and each has been followed by a rapid increase in the number and quality of such rules. The first was the introduction of the Law of Nature by the Roman Jurists; the second, the establishment of the principle of Utility by Bentham. It would be wrong, however, to place these upon the same level. The law of Nature cannot be said to have given to the Roman Jurists a principle according to which they could work. Its main effect was to break down the rigid legal distinctions which had grown up in course of time, and to induce the Jurists to bring their rules into conformity with the facts of life. In other words, we may say that it rendered possible the free extension of Applied Law. The distinction which I have been at some pains to establish, then, seems to give us a sure test as to the real effect of the Law of Nature. It is now well known that its origin was historical. It arose from the *jus gentium* which the Prætors had been applying for generations. But what the Prætors had done grudgingly and of necessity, that the Jurists, upon the recognition of this principle borrowed from Greek philosophy, did freely. In other words, the Prætor started with his rules of Pure Law, that is, with the *jus strictum*, and only corrected these by rules of Equity when the injustice which they produced was too gross to be tolerated. He was still trammelled by the importance assigned to Positive

Law, and had not realised that Law exists for Man, not Man for Law. But when the Jurists discovered that rules of Law must be adapted to Nature, they meant nothing more by this, than that Jurisprudence should take the position which we have been attempting to defend for it. It is not the science of Positive Law, but the science which deals with the regulation of legal relations in accordance with human needs. It must have a continual outlook upon the actual affairs of life. By reference to these it must keep broadening the rules of strict law; and when this is not sufficient, it must frame rules of equity to correct their strictness. Thus the recognition of the Law of Nature gave the Jurists no new principle by which they might make rules; it only altered their position with regard to the two departments of legislation. Having adopted this guide, they abandoned all respect for ancient rules as such; these were founded on imperfect inductions, and the sooner the inductions were completed and the rules improved the better. Further, too, it was to be definitely recognised that the rules of strict law never could be applied in actual life without correction. Hence rules of equity must not be established grudgingly; but, with due regard to regularity in human affairs and simplicity in the law, they must be allowed wherever they are necessary, in order that legal decisions may fulfil their purpose and harmonise with Justice. But when we enquire what principle the Roman Jurists adopted in the formation of new rules, we shall find that when they were conscious of a principle at all, it was the only one which

has ever been advanced by practical lawyers,—the principle of convenience or of utility. I must again emphasise the twofold manner in which rules for future guidance are formed. The first is the direct appeal to experience, such and such a decision or custom has satisfied men in the past, hence such and such a rule will satisfy them for the future. This was the method followed in the introduction of much of the Roman equity law. All the *jus gentium*, properly so called, had its origin in this manner. The Prætor takes a more extended view of human relations than the old Civil Law, and he introduces rules which have actually existed elsewhere. But the other method consists, as has been already pointed out, in enquiring what is the ultimate cause which has made those rules and customs acceptable. When this has been once ascertained, we shall be able to frame new rules freely. It is obviously wrong to say that the Roman Jurists found such an ultimate cause in the Law of Nature. So far as this represents any solid principle at all, it represents the principle of appeal to the most extensive view possible of actual human relations in the past. Whatever we have more than this, is merely the opinion of the person using this law as to what is really right and just; in other words, it inclines him to look away from the decisions of strict law and bring himself once more into direct contact with real life. But in this state of things, if actual experience fails him, what principle is he to take as his guide? Here, as I have remarked above, the Roman Jurist applied, without properly realising its significance,

the famous test which Bentham first formulated. When it was apparent that the application of a rule of strict law was producing manifest injustice, he allowed a deviation from it "*causa utilitatis.*" In other words, he found that by so doing, general convenience would be best consulted, and this seemed to him sufficient justification. The influence of the Law of Nature was therefore twofold. In its earlier historical condition, when it was acted upon, though not yet formulated, it allowed a freer use of the appeal to past experience for the formation of new rules; in its later stage, when it had been consciously received as a guide, its whole effect was expended in inducing the Jurists to look directly at human relations and not to keep their attention too exclusively fixed on positive law. In other words, it predisposed the Jurists to adopt a right course, but it gave them no principle to guide them in that course. I have said that the only principle which has ever been accepted by practical lawyers is the principle of Utility. It is needless to remark that principles are acted upon long before they are formulated and so brought within the sphere of general consciousness. The great difference, however, is, that when they have once been thus realised, their usefulness is enormously increased. It was the great merit of Bentham, then, that he gave distinct expression to the principle of Utility. In itself it is sufficiently simple. Its whole substance is contained in the following words:—

> Of two opposite methods of action do you desire to know which should have the preference? Calculate their effects in

good and evil, and prefer that which promises the greater sum of good.[1]

But whereas it had been applied hitherto meagrely and tentatively, it now became a principle which was to guide the Jurist at every step. It is by this alone that Jurisprudence is raised to its proper dignity as a science. We are no longer compelled to follow blindly the decisions and customs of the past. We now know that these, so far as they were good, derived their excellence from their accordance with the principle of Utility. It is the same principle, then, that we must use in devising rules for the future. I have already likened the introduction of this principle to those great discoveries which placed Astronomy upon its present deductive foundation, and I remarked that its followers must still keep themselves in contact with actual facts in order to determine the constants in their equations. The same observation applies with increased force to Jurisprudence. We have indeed got a principle; we have substituted a bold course of calculation for the old timid process of guessing, but the elements of our calculation are the facts of actual life. As a rule these can only be taken from experience of the state of human relations in the past and in the present. It is the recognition of this fact that requires in the Jurist a large acquaintance with actual life. When we leave this basis of actuality we sever the science from human interest; and its professors, as is well known, soon fall into discredit.

[1] *Theory of Legislation*, p. 87 of Hildreth's translation.

CHAPTER IV.

THE INFLUENCE OF POPULAR IDEAS ON JURISPRUDENCE.

In the last chapter I may, perhaps, be thought to have laid too much stress upon that province of Jurisprudence which is concerned with the amendment of old rules and the discovery of new ones, and it may be said that the proper object of Jurisprudence is exposition and not discovery. This, however, I take to be a fundamental error, and it seems equivalent to saying that we may, indeed, seek to improve the current text-books in Dynamics, but must not seek to alter their substance. Every science, in fact, has two classes of adherents, those who seek to extend it and those who seek to put it into practice; when the former class have discovered either a new principle or a fresh application of an old one, and have thoroughly verified it, it is adopted by the latter class for practical purposes. There is, indeed, no essential reason why in Law too the Jurist should not provide rules for the lawyer. The literature of the science would in this case consist of three kinds of works—original investigations, expositions of received principles, and mere collections of rules. A work of the last kind corresponds to an ordinary book of practice; a work

of the second kind would be a volume of Applied Jurisprudence as I have above defined it; a work of the first kind would, according to received notions, be removed from Jurisprudence entirely and put into the science of Legislation; for there is this peculiarity in Jurisprudence, that authority guides its practitioners rather than principle, and that special measures have to be taken to ascertain this authority. By authority, I mean of course the approval of some other person or persons than the professors of the science, for in practice we must always follow authority of some kind. At the only time when Jurisprudence was really in a satisfactory state this interposition of a foreign authority between science and practice did not exist, for such was the case in the creative period of Roman Jurisprudence. But in general, owing to the peculiar nature of the subjects with which the science deals, it is impossible to go direct to its professors for information, and we have to go to an intermediate authority instead. Sometimes, indeed, this authority cannot be said to be intermediate, for there is no science beyond it; it is then the ultimate source of law, and legislation in this stage is detached from principle and is either selfish or merely empirical. But at the present day there is frequently an appeal to science in some form or other, and the department of science to which we appeal is called the science of Legislation. According to this division, everything appertaining to law as between the Sovereign and the subjects is placed in the science of Jurisprudence; and everything as between the men

of science and the Sovereign in the science of Legislation. This, however, is a view which I conceive to be dangerous to the ultimate destinies of Law. We must allow Jurisprudence to cover the whole field of Law, both the discovery of new principles and the exposition of old ones. The question of whether an authority should be interposed between science and practice, and the form in which this should be done, is of the greatest practical importance. In recent times this authority has been universally allowed, and it has been more and more vested in the Sovereign directly, taking that word, of course, in the sense given to it by Austin. If this is to continue, the great question will be how to make the Sovereign himself dependent upon Jurisprudence. To be quite clear, I may say that principles of law in the ideal state are discovered by the professors of Jurisprudence; the office of the State is simply to place upon these a mark by which they may be known in practice. This, for instance, was done when an imperial decree pointed out Papinian and certain others as the authorities by whom the judges were to be guided.

I now propose to consider certain differences in the juridical names current in Germany and in England, and to point to a fundamentally different conception of Law which is closely connected with them. The subject, of course, has attracted notice before, and is discussed by Austin in an interesting note (i. 293), but I am not aware that it has been dealt with in the manner which I am now about to suggest.

Jurisprudence is a science which deals with the

actions of men, and hence we may reasonably expect that when it arises among different peoples, and is therefore founded upon different states of fact, it will in its development pursue somewhat different directions. Moreover, where a science deals directly with the actions and interests of men, its early origin is obscured by the birth of popular ideas upon these actions and interests, and when the science first becomes conscious of its functions it finds that its field has already been occupied and that its ideas have received names which are in everybody's mouth. These names, however, only represent the general vague idea which is present to an ordinary mind, for it is well known that an idea, unless it corresponds to some concrete shape, never does assume a strictly definite form in the mind without much labour and careful examination. Those, indeed, which correspond to concrete shapes may be handled by all intelligent men with accuracy, for the idea in the mind of each man corresponds to the same external thing, and no mistake is made when we translate our ideas into actual life. But when our idea merely corresponds to an abstraction, and when, although it is embodied continually in actual life yet such embodiment takes place under many different shapes, in this case the idea takes different forms in the minds of different men, and hence mistakes continually occur when they attempt to translate these ideas into actual life. An example will make this evident. If one man agrees to sell a horse to another, no particular horse being present or being thought of, there is no doubt

that the agreement can be properly carried out, for though the purchaser may object to certain qualities in the horse which he receives, yet there can be no doubt that he has got what he bargained for as soon as he receives a horse of any kind. But if the further condition of the sale is that he shall pay whatever price may be fair, there is now great risk that the completion of the transaction will not satisfy the expectations, that is, will not realise the ideas of both parties; for whereas each had a sufficiently exact notion of a horse, yet each may have very various notions as to a fair price. Now this example illustrates what I wish to point out. The natural objects which we see around us, numerous as they are, are yet capable of exact discrimination, and popular language as it grows up corresponds to these discriminations, and is therefore fairly correct. Natural sciences may object to sundry popular classifications and may discover many distinctions that have been overlooked. They have, however, a fair number of accurately used expressions with which to begin, and can immediately lay a foundation of some stability. When, however, our science deals not directly with physical objects but with the actions of men, a great difference is discernible. The qualities which belong to these actions are never reproduced in exactly the same form, and as we get our ideas of these qualities from the concrete shapes they assume, the ideas vary in the minds of individual men. Hence, when words arise corresponding to these ideas, we are liable to continual confusion in the use of

them. And the effect of this is further intensified also in the case of the sciences which deal with human actions. For whereas a natural science not only starts with some ideas of sufficient accuracy, but is also allowed both to define them more exactly and to discover new ones at pleasure in the dispassionate secrecy of scientific research, with the moral sciences it is quite different; they, on the other hand, not only have to use names of elementary ideas which have no precise meaning, but the close relation which they bear to actual human interests long prevents them from rising out of the arena of popular passion. Unwilling to forfeit the benefit of immediate influence on mankind, it is long before they are subjected to purely scientific treatment. They remain continually upon the low level of actual life, where it is impossible to shake off the views that clung to them at their birth. Hence not only do the actual facts in which a science takes its rise powerfully influence its direction, but as it is to these early generalisations from facts that names are given, the science is influenced by them through these names long after their proper influence has died away. Jurisprudence gives a striking illustration of these remarks, and I shall point out the influence which different states of fact have had upon its development in England and in Germany, and offer some remarks upon the manner in which such influence seems to have been perpetuated by popular language.

The fundamental ideas which we can immediately recognise in juridical notions are those of Law in

general, of particular rules of Law, of legal Rights however conferred, and of the allied notion of that which is morally Right, or which is Just. We have thus four ideas, three of them belonging by common consent to the sphere of Law proper, and one of them, according to present notions, removed from Law and placed in the sphere of Morality. And yet, putting aside for the present the synonym "just," we have in English only two words, Law and Right, to denote these four notions, and in order to distinguish between them we have to use periphrases of various kinds. In Germany the scarcity of words is even more apparent. The word *Recht*, which corresponds to our general word Law, has to do duty not only for our word *Right*, but also for one other meaning at least of the word *Law*. Thus Law in general is *Recht*, the privilege which a man legally enjoys is called *Recht*, and the conformity of this privilege to public opinion is also *Recht*. The word still lingers when we come to our fourth idea, for a rule of Law is a *Recht-satz*, unless it happens to be the result of direct legislative enactment, in which case it is a *Gesetz*, corresponding to our *Statute*. It is easy to comprehend how this inclusion of certain legal ideas in one country under the dominant term *Law*, and in the other country under the dominant term *Recht*, tends to give from the very beginning a different tone to legal speculation. In England Jurisprudence is the science of Law, and while Law may be said to contemplate generally certain relations which men bear to each other, denoting in its most general sense,

that is, the juridical side of these relations, yet it connotes in the English mind the commands which govern them, and indeed in its more usual and restricted use denotes these commands merely. Jurisprudence, then, to an English mind deals with the relations of mankind as governed by the commands of a sovereign. In Germany, on the contrary, Jurisprudence is the science of Right, and while Right may be said to contemplate generally certain relations which men have to each other, to denote, that is, the juridical side of these relations, yet to the German mind it cannot fail to connote at the same time both the claims that one man hence derives against another, and the coincidence of these claims with the common sense of justice. We thus see how Jurisprudence, when once planted on English soil, took a form essentially different from that which it wears on the Continent. We cannot express this better than by saying that in England Jurisprudence is, as Austin with so much labour showed, the science of Positive Law; in Germany it is the science of Justice. In other words, as Positive Law aims at carrying out primarily the commands of a sovereign, and as Justice aims primarily at carrying out what is agreeable to the national conscience, or, in other words, what is in accordance with national customs, we may say that Jurisprudence in England deals chiefly with Law as springing from Legislation, and in Germany with Law as springing from Custom. A slight reference to historical considerations will show how natural this distinction is. Whatever validity may have been ascribed to custom in Saxon times, this was largely oblit-

erated by the rapid centralisation of the kingdom, due first to the spread of feudalism and then to the rise of the royal power. The growth of feudalism carried with it the transfer of judicial power to the lord, and this passed easily to the sovereign. Even thus, however, custom might have remained as the great source of Law but for the conquest of the kingdom and the introduction of a foreign legal system. It is true that this system referred chiefly to landed property, but the great preponderance of this form of property at that time renders the circumstance of little importance. Although the ancient customs did not lose their validity, yet it is matter of common history that the new ideas, however foreign they might be to the spirit of the people, rapidly pervaded all juridical relations. Thus there soon arose in the minds of the people the idea, that Law was a thing dependent on the will of the sovereign, and not necessarily, or perhaps even as a rule, coincident with Justice. A man still had privileges of a kind, he still had *Rights;* they no longer sprang, however, as in old times, from his ancient customs, which coincided with his idea of Right, but they were such as the new Law chose to allow to him. And hence the word *Right*, which in Saxon times was used like the German *Recht*, gave place to the word *Law.*

In England, therefore, owing to historical circumstances, a separation took place between the two ideas of what a man is allowed to do by public opinion and what he is allowed to do by law; a distinction valuable indeed to the analytical jurist, but

resulting like other scientific ideas from experiments *in corpore vili*. The lawyers, who were interested in the new order of things, brought no moderating influence to bear upon them, and hence was effected in England the proverbial separation of Law and Justice. In Germany, matters took a different direction. There was no such rapid rise of the sovereign as in England, and consequently no centralisation of legislative power; the feudal princes, moreover, having no desire to introduce a foreign system of law like that which animated the Normans in England, to a large extent respected the ancient customs. This difference has recently been strikingly illustrated by the much more extensive traces which have been found of the village community in Germany than in England, and it is notorious that while in the latter country feudal rules were applied almost universally, the peasants of Germany still retained their local customs for the regulation of property in land. This was the case throughout the Continent generally. The matter has been recently reviewed by Sir Henry Maine,[1] and he concludes by saying: "It was by an exception and a remarkable one, that in our country the land-law of the nobles became the land-law of the people."

Although then the English judges professed to be guided by custom, yet this seems to have been recognised as mere profession. What struck the popular mind is exactly the same fact as that which seemed so important to the mind of Austin; they derived their power directly from the king. But in Germany, not

[1] *Early Law and Custom*, p. 341.

only were the customs of the people really respected, but another cause prevented the growth of an immediate and exclusive connection between Law and the Sovereign. This was the open introduction of the *Corpus Juris* as a source of Law. The exact effect which this has in the past had, and which it ought now to have, upon German law has been a subject of much discussion in recent years, and I shall have occasion to return to it in another place; but it is sufficient here to point out the influence which it has had upon erecting Science into an independent source of Law. While then in England, the tendency was to see this source in the king only; in Germany, Custom and Science were primarily recognised. But Custom, as I have said, is in early times identical in the popular mind with Justice; and the rules of Roman law have an inherent equity or equality of their own.

There was therefore no separation between Law and Right as in England, and the analysis which history had made possible for Austin was impossible to the great Civilians.[1] Austin postulates first a sovereign

[1] Since writing the above I have discovered that opinions on the subject of the Roman Law are held by German jurists which are certainly incompatible with the view I have been maintaining. Thus Ihering, in his *Struggle for Law*, writes: "It is a foreign Law, written in a foreign language, introduced by the learned who alone can understand it perfectly, and exposed from the first to the different and changing influence of two entirely opposite interests, frequently in conflict with each other; the influence, I mean, of science, purely and simply historical, and that of the practical application and development of the Law. It is therefore condemned to a permanent dependence upon, or to a permanent wardship of, the theory; and hence it is that particularism prevails in legislation and in the administration of Justice

armed with illimitable power, and then enquires from him what the law shall be; the German jurists postulate some means of discovering law, and then demand a power which shall enforce it. Now the greatest authority on this matter, who has especially examined it with reference to the legal systems prevalent in India and ancient Ireland, and has found it to be inapplicable to them, nevertheless states that it is the goal to which all legal ideas tend. He says that "though it be improper to employ these terms *sovereign*, *subject*, *command*, *obligation*, *right*, *sanction*, of law in certain stages of human thought, they nevertheless correspond to a stage to which law is steadily tending, and which it is sure ultimately to reach."[1] He further observes, and the views I have presented above as to English law are partly coincident with the same idea, that "the capital fact in the mechanism of modern states

over the weak and limited efforts made to reach centralisation. Can it be a matter of surprise that a gaping abyss stood between such law and the national feeling of legal right, that the people did not understand the law nor the law the people. Institutions and principles which in Rome were, considering the circumstances and the customs, intelligible, became here, on account of the complete disappearance of the conditions precedent, a real curse; and there never was in this world a mode of administrating Justice with more power than this to shake a people's confidence in the Law, and all belief in its existence." (Lalor's translation, p. 113). This is certainly strong language, and is almost worthy of an English writer; we shall indeed see later on that the author in many points approximates to the English School of Jurisprudence. But while I do not mean to imply by the above remarks that the fusion of Law and Justice has ever been complete, I cannot help believing that it was more nearly attained when Roman Law was imposed on Germany, than when Norman Law was imposed on England, or English Law on Ireland.

[1] *Village Communities*, p. 70.

is the energy of legislatures," and continues, "until the fact existed, I do not, as I have said, believe that the system of Hobbes, Bentham, and Austin could have been conceived; wherever it exhibits itself imperfectly, I think that the system is never properly appreciated. The comparative neglect with which German writers have treated it seems to me to be explained by the comparative recency of legislative activity in Germany."[1] It would seem, however, advisable before thus accepting the analysis of Austin as final even for England, to consider more carefully what is implied in the fact that it is not applicable to our own race in primitive conditions and times at all, and that it has not been accepted even by that portion of our race which in modern times has been most eminent in juridical science. It is possible that our English idea of Law as a creature dependent on the sovereign may be only transitory, and in earlier and other ideas on the subject there may exist an ultimate germ of truth which it might not be unprofitable to discover. Even if it be impossible in practice to separate Law from the sovereign power, yet it may be well to remember that elsewhere it is esteemed to have an inherent dignity of its own, and it is not impossible that if the jurist and the legislator keep this in mind, there may be a more uniform agreement effected between Law and Justice.

When, then, Austin discovered that there was in England no science of Jurisprudence, and set to work to found one, the first difficulty that met him was this

[1] *Early Institutions*, p. 398.

very one of the confusion attending the use of popular language, and, as he was bound to make himself generally intelligible, he had no choice but to use the words which represented the vague popular ideas, and to do the best he could with them, snuffing them, as he said, with apt distinctions; and thus the very ground from which he starts is the necessity of introducing into the science an accurate use of language and so of thought. "It really is important," he says "(though I feel the audacity of the paradox), that men should think distinctly and speak with a meaning."[1] He grows eloquent upon the advantages that would accrue to the moral sciences generally if this method were adopted, and reiterates the old entreaty that they would take a lesson from the accuracy of mathematics. Speaking of the influence which a general desire for truth in these sciences would have upon their prosecution, he urges that the writers should "attend to the suggestion of Hobbes and of Locke, and imitate the method so successfully pursued by geometers. . . . Though they would often fall short of geometrical exactness and coherency, they might always approach and would often attain to them. They would acquire the art and the habit of defining their leading terms, of steadily adhering to the meanings announced by the definitions, of carefully examining and distinctly stating their premises, and of deducing the consequences of their premises with logical rigour."[2] The plan which he thus commended he himself carefully followed, and his book presents probably the

[1] *Jurisprudence*, i. 123. [2] *Ibid.* i. 140.

best specimen we have of the exact definition and consistent use of terms in the exposition of a moral science. It is to be regretted, therefore, that he was influenced by only one form in which law presents itself, and that by considering societies in only one stage of development, he bound up his legal system with theories on Government from which it should properly be kept distinct. As I have already remarked, no considerable attempt was made to question the system thus established until a competent observer was brought face to face with facts which militated against it. We now know from the writings of Sir Henry Maine that the analysis of Austin was inapplicable to Indian village communities as they existed till recently; and that these, moreover, might be considered fairly civilised whatever may be thought of the condition of the ancient Irish tribes, to which the analysis is similarly inapplicable. But equally instructive is the course which legal development took among the Romans. To this also the writings of Sir Henry Maine have called attention, and in its earliest stages it has been sketched in a masterly manner by von Ihering of Vienna in his *Spirit of the Roman Law*. The material thus placed at our disposal, combined with what we know of the subsequent development of Roman Law and of its influence in Germany, makes it possible for us to take a more extended view of the subject, and to decide whether, if the ancient view of Law be fated to pass away, there are not some germs of truth in it which may support Jurisprudence under the weight of

physical force with which it is likely to be overwhelmed.

The course which Austin takes is well known. Briefly put, it is as follows. He starts, or rather as Sir Henry Maine has pointed out,[1] if he had adopted a perfectly logical order he would have started, with the idea of Sovereignty. This takes its rise in political societies, and such a society is defined as follows: "In order that a given society may form a society political, habitual obedience must be rendered by the generality or bulk of its members to a determinate and common superior."[2] He further guards this position by saying that, "in order that an independent society may form a society political, it must not fall short of a number which cannot be fixed with precision, but which may be considerable or not extremely minute." We thus commence with the idea of a society of men, not too small in point of numbers, living in subjection to a sovereign, and affected by this subjection in all their relations. It is easy, then, to say that a law is a command proceeding from the sovereign and enforced upon the subjects by means of a sanction, by the threat, that is, of some evil which the sovereign, in virtue of his superior power, intends to inflict in case of disobedience. But, as in popular language, the word *law* is not used solely of such commands, the epithet *positive* is added, in order to distinguish such a law, which Austin, jealous for his science, calls a law proper, from other laws, which, he says, improperly bear the name. These laws,

[1] *Early Institutions.* [2] *Jurisprudence*, i. 229.

improperly so called, are laws of God, moral laws, and natural laws. A positive law is said to impose a duty upon the persons to whom it is addressed as a command, and it may confer a right upon some other person or persons in whose favour it is issued. From the initial idea of Sovereignty we thus get the derived ideas of Positive Law, Sanction, Duty, and Right, and we are told that "The science of Jurisprudence (or, simply and briefly, Jurisprudence) is concerned with positive laws or with laws strictly so called, as considered without regard to their goodness or badness."[1] Now the whole of this position has been exhaustively reviewed by Sir Henry Maine in the last two chapters of *Early Institutions*. He there compares Austin's method with that of the Economists, who, for the sake of simplifying their science, discard the effect of all the motives which regulate human conduct except one—the desire to make as much profit as possible out of other people. He points out that the Austinian view is the result of abstraction. "It is arrived at by throwing aside all the characteristics and attributes of Government and Society except one, and by connecting all forms of political superiority together through their common possession of force."[2] Hence, as in arriving at the abstract ideas of the science, so much has been thrown aside, it is or ought to be impossible to apply the principles of the science in actual life until corrections have been made. But apart from the indignity which we may feel to be put upon Jurisprudence as a

[1] *Jurisprudence*, i. 176. [2] *Early Institutions*, p. 359.

science, by resting its foundations upon a temporary and unworthy basis, there is very grave practical danger to be apprehended from this course of proceeding. It is not sufficient to warn the student, as Sir Henry Maine does, that the system which is before him is founded on a mere abstraction and must not be put into actual practice; for it is not the student from whom the danger will here arise. The more nearly the interests of a science approach to actual life, the more danger there is that its abstract principles may be laid hold of by people who are not students, and carried out into practice without the necessary corrections. The engineer does not trouble himself about the principles of pure mathematics; he waits till these have been turned into a practical form and then uses them for his own purpose. But the principles of Economics and of Jurisprudence are not thus abandoned to the mere student. The actual workers in life—the popular writers and the popular legislators—get hold of them and proceed to apply them for their own purposes, regardless of the corrections which a dispassionate student of these sciences would make. The result is, that when ordinary people realise the principles which are thus at work in their midst they become disgusted, and the science, though it may be itself by no means to blame, comes in for a large share of prejudice. This has certainly been the case with Economics, and at the present time I believe its adherents are unwilling that it should stand any longer upon its old abstract principle, which left out of sight so much of human nature;

they prefer rather that it should be corrected, to some extent at least, before it is allowed to go out to the world. A similar fate might perhaps have befallen Jurisprudence had the science ever excited the interest that has been aroused by Economics; but the hopeless position of ignorance into which the lay portion of the English people has been driven with regard to legal matters, has made such general interest impossible, and probably few who are well acquainted with the work of Smith, Ricardo, and Mill, have ever heard of Austin. It remains, however, none the less true, that here also it will be fatal for the legislator to dream that he is really armed with the powers which Austin confers upon him, and if Jurisprudence is actually to be confined to the science of positive law as above laid down, a day may come when the general disgust that must be aroused at its results will only be the more intense that it is long delayed.

It is clear, from these remarks, that instead of sending forth to the world the Austinian conception of Law as the foundation of our science, and leaving it to be corrected in practice as best it may, it might be advisable to put it in a position in which the inherent value of Law will be more apparent. It may indeed be impossible ever to separate it from that physical force which supplies its sanction, but this is no reason for making Law in its purest form dependent on that force. The influence of fundamental ideas is well known, and if we can once establish the conception of Law as the outcome of a

regular science of legal relations, we may have done something to advance the day when the State power shall be recognised to be the servant of Jurisprudence and not its master.

The task then which lies before us is to discover upon what primitive elements the ideas of Law and Right ultimately rest. We have seen reason to suppose that the analysis which ascribes them to the commands of a sovereign supported by unlimited power is true only for men in a certain stage of development, and perhaps, even for them, only apparently true. For men in other stages of development it is not even apparently true, and yet they are conscious of a sense of security and comfort arising from the fact that the relations existing between them are governed not by chance or brute force, but in accordance with settled rules. It is possible then that as our ideas of Law and Right are not held by other peoples, so we may be able to resolve them into ideas more general still, into ideas which shall be, so far as men are governed by Law at all, of universal application. But as the ideas which we possess spring naturally from the facts that we see around us, it is hardly possible for them to undergo any change until we can compare them with ideas springing from a different set of facts. However great may seem to be the power of imagination in the human mind, yet it is really very limited, and consists only in the recombination of familiar facts. Imagination, therefore, will not lead us outside our own limited range of ideas; we must have other sets of fact placed before

us before we can make any progress. To help us to realise these when once presented to us, imagination of course must be called in, and thus only can we make clear to our minds those pictures of far-off times and places with which we have to deal. It is clear, then, that if our ideas of Law are to be subjected to a further analysis, it can only be by comparing them with the ideas of peoples who live or have lived under other systems of law. We must try to abandon our own way of looking at juridical matters, however natural it may appear and however perfect we may think it, and try to adopt that of other peoples and other times; nor must we be surprised if we find that a fair amount of security and prosperity may pervade the relations of man to man, though there be no Sovereign who makes laws and no State power which enforces them. We have to consider Law as it existed among peoples to whom our modern political notions were unknown; but it is exactly with these modern political notions that our ideas of Law have become so fused that it is impossible for us to separate them. The difference that hence arises between our way of looking at the subject and that of totally different peoples is immeasurable. But while I do not, of course, suggest that the result of our analysis ought to take us back to primitive times, yet it may not be improper to enquire whether the idea of a Sovereign and of Force are elements of the first order in the idea of Law, for, if they are not, we shall probably discover the fact by tracking the course of Law from its earliest development. Should we arrive at such ulti-

mate ideas of Law as we are now in search of, we may still have to combine them for practical purposes with the political ideas above mentioned. A most important and salutary influence, however, may be exerted upon this combination and its results, by remembering that it is at best a combination of expediency, not of necessity; and though it must at present continue, yet Law has an independent sphere of its own from which it sprang, and to which, perhaps, it tends. In accordance with the above plan, I shall give a brief sketch of the gradual development of Law, and for this purpose it will be necessary for us to have some clear ideas on the origin of society. I have already stated the sources to which I shall chiefly be indebted. To many, indeed, the following chapters may seem unnecessary; they are, however, introduced in order to give something of real existence to our conceptions of early law, in order that these may serve as a basis for our ultimate conclusions. In such matters everything depends upon the clearness of the ideas with which we start.

CHAPTER V.

PRIMITIVE SOCIETY.

THE publication of *Ancient Law* practically revolutionised the ideas of English readers upon the primitive condition of society. All the early attempts to reason about the primitive state of mankind were vitiated by the error that afflicts every science at its commencement. It determines at once, by a process of guessing, the ideas or principles which it shall adopt as its basis, and then proceeds to reason from these deductively. But no science can claim the privilege of deduction until it has passed through a long and toilsome course of inductive discovery. Some sciences there are which have not yet accomplished this, others which have hardly begun it. The science which attempts to deal with the relations of men, and especially their primitive relations, can only recently be said to have escaped from the above error. The course which it originally adopted has been well described by Sir Henry Maine in *Ancient Law*. It consisted, as he there tells us, in "first supposing mankind to be divested of a great part of the circumstances by which they are now surrounded, and by then assuming that, in the condition thus imagined, they would preserve

the same sentiments and prejudices by which they are now actuated, although, in fact, these sentiments may have been created and engendered by those very circumstances of which, by the hypothesis, they are to be stripped."[1] The keynote to the revolution which has thus taken place in considering the early relations of mankind, is the discovery that we must not conceive of primitive man as existing in the separate and isolated condition of modern times, in which sentiment has but a small share in regulating his conduct with regard to his fellows, a regulation which is now largely effected by contract; we must, on the other hand, exalt and enlarge the feelings which spring from family and political life, and conceive of men as regulating their actions chiefly with regard to the position they hold in the family or in the community. In other words as "the movement of progressive societies has hitherto been a movement from Status to Contract,"[2] so, in returning to primitive times, we must follow the reverse order; we must cease to think of the relations between man and man as arising by agreement, and look at them as taking their origin in the natural position of the individual as a member of a family and of a community.

Thus, while early speculators regarded primitive men as individuals in a state of war until they found it necessary to regulate their relations by contract, recent investigations lead us to regard the primitive man as a member of an organisation which, however hostile may have been its relations to other similar

[1] P. 254. [2] *Ancient Law*, p. 170.

organisations, was yet internally in a condition of settled peace and order. As natural sentiment, wherever it exists, even now binds men together far more strongly than contracts enforced by law can do, so we may easily conceive that in the primitive family, meaning by this word a somewhat extensive assemblage of individuals, a peaceful and harmonious condition of things existed which was certainly not contemplated by the writers on the social compact.

Taking advantage, then, of the information which has thus been given to us, I shall present a short sketch of the actual course which the development of society has taken, in order to point out how the different stages of this development correspond to radically different conceptions as to the nature of Law, and in order to present, in as clear a shape as possible, the actual forms which legal relations have taken. In doing this I shall suppress details as far as possible, and thus the results may appear somewhat idealised and the distinctions too sharply drawn. It must be remembered, however, that we are only seeking for foundations on which general conceptions must rest, and that these have almost always to be rectified when reintroduced into actual life.

There has been a very prevalent opinion that mankind passed through a roving and pastoral stage before they took to agriculture and settled down upon definite tracts of land. But although we wish to get the earliest view possible of those rules which correspond to our modern law, it would be superfluous for us to go back to this stage in human development.

Professor Holland does, indeed, tell us that "the shepherd who guides his flock, or, on a larger scale, the head of a family who regulates its encampments and employments, seems to have been the earliest 'lawgiver,' and his directions, as orders given by one who has power to enforce their observance, are the earliest 'laws':"[1] but it seems to me that we cannot consider mere detached commands of this kind as in any way corresponding to the true notion of law, and the comparison perhaps shows too rigid an adherence to the Austinian Sovereign and Sanction. It is true that all assemblages of men must submit to certain rules; yet these, among a society in the pastoral state, pertain rather to general administration, like those which govern an army, than to the social relations between individuals with which legal rules are more properly concerned. These rules, indeed, chiefly refer to property and the relative position of individuals; a relative position which, in later ages, is determined by contract, but, in earlier times, by conditions imposed by birth upon the individual, and denoted by the term *status*. Hence legal rules do not become prominent until the possessions of the community or of individuals attain some importance, and until the organisation of society requires the imposition of different duties upon different individuals; until, that is, we have a regulated system for the use of property together with distinctions of caste. This, however, does not apparently happen till after the pastoral stage has been passed, and it is to subsequent developments that we

[1] *Jurisprudence*, p. 13.

must look for the social facts which have favoured the growth of legal rules and of regulated sovereignty.

It may be as well to state at once that I regard it to be of the essence of Law that it should govern all parties in the State, and hence it is more proper to look for its origin in Custom than in Command. It is true that one German writer of note has come so near to the English school as to regard Law as a Command, but then he goes beyond it in requiring that this Command should have a bilateral force, and he maintains that we have not arrived at the developed idea of Law till we have seen the State power learning to control itself and submit to regulation just like a subject.[1] Of course I do not deny that Law, considered merely as a command, has had the greatest influence on legal progress.

It will be useful in the first place to give a brief summary of the course of events in primitive society which Sir Henry Maine has been gradually making clear to us. In the beginning of things we find men united by ties of actual or assumed consanguinity; and in the latter case the assumption is not merely sentimental, like our modern saying that all men are brothers, but it is to all intents and purposes regarded as a fact.[2] At the head of the group thus united we find the Chief, who derives a direct descent, if possible, from the common ancestor, but who must qualify by merit as well as by birth. The government of the tribe is in the hands of this Chief, but he is more like

[1] Ihering, *Der Zweck im Recht*, p. 344.

[2] *Early Institutions*, p. 65.

a father than a sovereign, and the clan is ruled by his direct commands rather than by fixed laws; these, indeed, are hardly required at this point, for there is no private property, and the relations between man and man are of the simplest description. Already, however, we see the Chief assisted by a Council, either of all the heads of families or of a chosen few to represent them. The great step towards a change in social relations is taken when the clan abandons its pastoral life and settles down upon the land. I have spoken of a clan, but it is possible that the assemblage may have grown into a larger group still, and, consisting of a number of clans, may more properly be called a tribe. In order to give distinctness to our ideas, we may regard the clan as a group of agnatic kinsmen, and the tribe as a group of cognate kinsmen; in other words, members of the same clan are all related through their paternal male ancestors, while members of the same tribe may be related through female ancestors.

When, then, this settlement upon the land has taken place, a new set of social forces comes into play, and these gradually produce the whole machinery of modern Law. The first point to be noticed is "that when a tribal community settles down finally upon a definite space of land, the land begins to be the basis of society in place of kinship."[1] We shall shortly see how this settlement upon the land produces first the Village Community, with its system of common tillage and rules of customary law, and how from

[1] *Early Institutions*, p. 72.

this we pass to the permanent division of land, the growth of private rights of all kinds, and the rules which are devised to regulate them. It is indeed this division of the land, as well as the mode in which it is held, which so powerfully influences the subsequent growth of society. Thus, so long as the fact of kinship is remembered as the bond of union, each clansman holds his plot of land by virtue of his position as a member of the clan. In such a case we have ownership by virtue of birth, and it is this fact in the social organisation of the Rajput States of India, that Sir Alfred Lyall has brought out so clearly. After this we have two directions of development, from one of which comes the Roman and from the other the Feudal ownership. In the former case, the settlement upon the land levels all distinctions; the citizens live in equality amongst each other, and each possesses his plot of land in absolute ownership: such is the Roman *dominium*. In the latter case, and probably after a brief period of Roman, or, as it is usually called, *allodial* ownership, society begins to arrange itself once more in ascending grades, but the tie which binds these together is not one of kinship; it now depends upon the fact that each lower grade holds its land from the one above. We have here, indeed, lost absolute ownership, save that it is vested in the Chief who forms the summit of these ascending ranks, and we have arrived at the Feudal state of society. The next step is to abolish all the intermediate links, leaving the people in a state of equal subjection to the Sovereign, who is

armed with all the powers of government. In this case, we return to the idea of absolute ownership, qualified, however, by the fact that the Sovereign can now at any time interfere with it. There are few historical questions more interesting and important than that of the feudalisation of society; for our immediate purposes, however, it will be sufficient to consider merely the gradual rise of private ownership in land, and the destiny of the power of the Chief after the settlement on the land has taken place. To these points, then, we will now address ourselves.

We have to consider first the change from a pastoral or nomad to an agricultural or settled mode of life, and this, of course, like all other changes, is one that requires time for its accomplishment, and is by no means effected at one step. Already in the pastoral mode of life there is a certain amount of cultivation. But as it is only necessity which forces this upon man, so at first it is done in the shortest and easiest way. The Tartars, for instance, during their temporary occupation of a tract of land, sow and reap a harvest of buckwheat. This is all over in two or three months, and then they are at liberty to resume their wanderings. In this state of things it is hardly necessary for any division of the ground to take place at all. We approach, however, the stage we are considering when the tribe abandons this perpetual moving and settles down in a particular spot.[1] Crops

[1] For an account of this process, as observed among the Bashkirs, see Wallace's *Russia*, ii. 47.

that require more care and a longer time are now taken in hand, and it becomes advisable to entrust special portions of ground to particular small groups of individuals. The absolute community of interests which has hitherto existed in the clan is thus somewhat broken up. The first step is made towards individualisation. As the pressure of circumstances, the necessities of a roving life, have hitherto extended absolute unity of interests beyond the limits which the ties of blood alone would set, so now, when these necessities are removed, the natural limits are revived; and as soon as a division of some kind in the clan is required, a return is made to the original unit from which men started, that is, to the family in some one of its forms. As soon, then, as a clan settles down to an agricultural life, an element of disunion appears in its midst, and this is shown by the division which takes place in the land and the assignment of particular portions, temporarily at least, to the different families. The original reason why this assignment is only temporary is very simple. Such a clan finds itself at first in the midst of a wide territory and there is no need to attempt to cultivate the whole of it. Hence, when the year's harvest has been gathered in, it is more profitable to move to fresh land and get the next year's harvest from virgin soil.

Cæsar remarks that the Germans applied themselves very little to agriculture—*agriculturæ minime student*—and that they never cultivated the same land two years together. The magistrates who annually allot to the several families the share which comes to them, make them pass from one part of the territory to another. Tacitus tells us the same thing: *Arva per annos*

mutant et superest ager, they cultivate fresh lands each year, and there always remains a portion undisposed of."[1]

The same reason, therefore, which dictated a division of the land at the beginning makes it necessary again each year. In certain villages in the Ardennes, in Belgium, which have large tracts of common land, this practice is still in force, and the same land is only cultivated once in every eighteen or twenty years.[2] In such cases, then, a redivision of the land each year is perfectly natural; if, moreover, so long an interval elapses before the same ground is occupied again, all memory of the former occupation will pass away, and the desire of separate ownership will not arise. A very important factor, then, in deciding how long this state of things will last, is the extent of land which happens to be at the disposal of the community.

In course of time the increase of population puts an end to this wealth of unoccupied land. The same land has to be cultivated or left fallow in regular succession year after year. The practice of redivision, to which the people have so long been accustomed, now acquires a further value. It removes any inequalities that may have arisen in the occupation of land, and gives an opportunity for the assignment of a portion to new families. Such inequalities will always arise apart from any private transfer of land where the division is based upon the number of adult males in the family. If, however, there is plenty of unoccupied territory, this may be used for the purpose without resorting to a totally fresh division. Thus, where a

[1] M. de Laveleye, *Primitive Property*, p. 102. [2] *Ibid.*

Russian *mir* or village community is settled upon "the lands of the Crown, where there is no want of space, the *mir* generally holds in reserve a portion of the land, that it may always have some for the new households that are formed; meanwhile, these unallotted parcels are let for rent. By this means the necessity for a new division is rendered less frequent."[1] In this case, therefore, the two reasons which originally dictated the continual redivision of the land disappear. There is no longer an annual change in the land under cultivation, and it is not necessary to make a fresh division to provide lands for every family. There is, therefore, no obstacle to the gradual rise of the notion of separate property in land, and to the entire disuse of the practice of redivision. Though, however, there is no direct obstacle, there are many reasons which delay such a result. Hence this form of the enjoyment of property has everywhere had a long history, and in many places continues down to the present day. It is the object of M. de Laveleye's *Primitive Property* to establish the universal appearance at some time or other in a people's history of such a condition of things. He has sketched it as it exists at the present day in Russia, in Java, in Switzerland, in Algeria, and elsewhere, and as it existed in former days in Germany; while Sir Henry Maine has called attention to its occurrence till recently through much of India, and to the form which it took among the Celtic tribes of Ireland. I need only remark here that this method of agriculture gave rise to a vast number of

[1] *Primitive Property*, p. 13.

rules of cultivation and rules for common use, in which we may see the origin of customary law.[1] Where a continual redivision of the fields takes place, it is absolutely essential that all should pursue the same plan of tillage, and the minuteness with which the division is carried out makes it necessary for each man to have certain rights over the lands of others, privileges which, indeed, present themselves not so much as special rights, but rather as essential to any enjoyment of the land at all. Sir Henry Maine reasons in the reverse order to this when from the prominence of servitudes in Roman Law he argues for the original common enjoyment of landed property, and says that the abundant Roman servitudes appear to him "to point back to the same modified common enjoyment of land which characterised other Aryan races."[2]

This, however, is not the only source of legal rules. Sometimes extensive works have to be undertaken for the benefit of the common property. Special usages in such cases will arise with regard to the labour to be expended and the right to share in the result. This happens, for instance, in cases where irrigation has to be carried out on a large scale. Examples of this, taken from the dominion of the Arabs in Spain, are given by M. de Laveleye; and at the present day the distribution of water provided by public works in India is entrusted to the proper village authority.[3] Other matters too may require regulation, such as the number of cattle to be placed by members of the com-

[1] *Village Communities*, p. 86. [2] *Early Law and Custom*, p. 340.
[3] *Primitive Property*, p. 129; *Village Communities*, p. 109.

munity on the common pasture land, and the amount of wood to be cut in the common forests. All these are sources of rules and practices which become, as time goes on, customary law. Among a people, then, who are little given to change, and who are of a submissive disposition, the very existence of this law binds them in fetters which can hardly be broken, unless some influence is brought to bear upon them from without. We may put this down as the chief cause which secures the continuance of the Village Community, as indeed it secures the continuance of most human institutions. As other reasons which affect the matter, we may name the part which agriculture plays in the life of the people, and the amount of individual labour which must be expended on the ground to make it yield a sufficient return; for where agriculture is important and demands much toil, there will, as we know, arise an unwillingness to continue it except on the condition of a continuous holding of the same land. A consideration of these points will show how the course of different nations has been determined. The Hindoo is indolent and submissive; he is accustomed all his life to consider and follow the customs which his ancestors have followed for generations before him. No great exertion, moreover, is required to produce the little that suffices for his support: the chief labour consists in procuring water for his fields, and as this is done by the combined labour of the community, it has no such separating effect as diligent cultivation of the soil. It is thus natural that the Village Community should have

lasted so long in India, and that it is only now yielding to the solvent influence of British rule. Among the early Romans, on the contrary, very opposite influences were at work. They were doubtless influenced largely by custom, but only to a slight extent compared to such a people as the Hindoos. With them it was necessary that custom should correspond to some extent with present needs. They had, indeed, great reverence for the past, and in some cases it was carried to considerable lengths, as in the observance of legal forms and ceremonies. But to this all peoples are liable. What we must chiefly notice is, that the Romans were never deterred by their reverence for antiquity from finding some means of making it compatible with actual needs. Moreover, agriculture formed a large part of their occupation, and demanded probably some considerable labour. We can thus understand how the above-mentioned reasons favoured the institution of private property in land among them, and how this was extended, if not in the form of property, yet in the form of continuous possession, to the *ager publicus* or common domain. In Russia we cannot trace the causes quite so plainly. According to the reasons laid down above, the tendencies should be pretty evenly balanced. The Russian peasant is submissive and inclined to adhere to custom; at the same time agriculture requires much toil and fills a large part of his life. It is not surprising then to find that another cause has intervened and settled the matter, and that the present striking position of the

Village Community is due to a peculiarity of taxation. Instead of the old land-tax a poll-tax has been introduced, and for this the Government holds the *mir* responsible. It is for the general interest, therefore, that every one should have a share of land, that he may be able to pay his share of the tax. Sir Henry Maine also notices that the same reason has favoured the preservation of the South Sclavonian House Communities, responsible as they are for taxation to the Mahommedan government.[1] But as British influence is affecting the village communities of India, so Western influence is affecting those of Russia. The influence, however, approaches in each case from a different direction. In India the influence strikes from above at the organisation of the community, by fixing the separate rights and duties of the members, and by undermining the old feeling of common interest. In Russia, on the other hand, the constitution of the *mir* is already fixed by government so as to bind it together. The influence of Western ideas is there felt in the family, where it tends to a dissolution of this body and a destruction of the paternal power. If we consider lastly the case of Switzerland we shall see how our causes have been at work on different sides. It might appear, at first sight, as though the independence of character which is a mark of the Swiss would have produced a separation of property there as it did at Rome, but we must notice the different state of the common property. In Switzerland the arable land does not exceed in importance

[1] *Early Law and Custom*, p. 237.

the other parts. The common property is expressly said to consist of forest, meadow, and cultivated land. The first two items in this case largely affect the people, and for the enjoyment of these no division is necessary. The old system of common enjoyment, therefore, did not become antique and useless, and the Swiss, who doubtless could have easily done so had they chosen, were under no inducement to give it up. They were not affected, moreover, by the Feudalism which played so large a part in introducing private property among the other Teutonic nations; for it has been pointed out,[1] that the system of private property in land which has grown up in most Western countries is due, not only to the separation of property produced by the dissolution of the Village Community, but also to the gradual spread of the idea of property which originated in the power of the lord, a power obtained first over the waste land and then over the manor.

In these remarks I have assumed that a clan has settled down upon the land, and has exchanged a pastoral for an agricultural life; I have introduced the subject in order to show that the want of the institution of private property, which characterised the former state, at first characterises the latter also; and I have traced very briefly the progress from the regular redistribution of the land to a final condition of absolute separation of property. It is further of some importance to realise the different forms which society takes when the settlement upon the land has thus been made, and it may assist us in some of our

[1] *Early Institutions*, p. 120.

subsequent remarks, if we have before us a brief outline of recent investigations on the subject.

The two forms which have been made familiar to us by the writings of Sir Henry Maine are those of the House Community and the Village Community, and between each of these and the Family there is a continual process of transformation going on. That this process is uniform cannot be affirmed, but we may say that the unit from which society springs is the Patriarchal Family;[1] that when the members of this keep together after the death of the founder, having a common dwelling, a common table, and common property, we have the Joint Family of the Hindoos and the House Community of the South Sclavonians; and that when these forms dissolve again into families, occupying the same tract of country, we have the Village Community.

In the true Village Community the common dwelling and the common table, which belong alike to the Joint Family and to the House Community, are no longer to be found. The village itself is an association of houses, contained indeed within narrow limits, but composed of separate dwellings, each jealously guarded from the intrusion of a neighbour. The village lands are no longer the collective property of the community; the arable lands have been divided between the various households; the pasture lands have been partially divided: only the waste remains in common.[2]

But though this series of changes from Family to Joint Family, and from the latter to Village Community, is useful to assist our mental conception, yet we cannot say that such a process of evolution always takes place, and indeed it is not at all settled which

[1] *Early Institutions*, p. 116. [2] *Ibid.* p. 81.

of the two last is really the primitive form. So long, indeed, as the pastoral state is continued it is of course impossible to distinguish between the two; they may be said, however, to correspond to difference of sizes in the clan, and perhaps this difference of size may determine which form is adopted when the settlement takes place. It is to be noticed, however, that whichever form is first established the other is continually tending to develop itself. Thus the House Community as it enlarges begins to split up into separate parts and becomes a Village Community: and the families in the Village Community tend in many cases to enlarge and become Joint Families. We may thus say that the House Community is the original form, for although it may not always be produced upon the settlement on the land, yet it corresponds to an earlier stage in the growth of the clan, and when it is really produced it tends afterwards to become a Village Community. When, on the other hand, this form is actually produced first, it is merely because the clan in its roving state has already developed beyond the limits suitable to a House Community. I have said that in this case the House Community is produced inside the Village Community in the shape of the Joint Family; and we are told that the House Community corresponds in most particulars to the Joint Family. There is, however, this important distinction, that whereas in each the tie of blood is very prominent, yet in the latter it constitutes the only bond of union, while the House Community rests also upon common occupation of the land. Thus the Joint Families are

only accidentally connected with the land however extensive the landed property may be. What holds them together is not land but consanguinity, and there is no reason why they should not occupy themselves. as indeed they frequently do, with trade or the practice of a handicraft.[1]

In the House Community, on the other hand, the occupation of land is an important element, though even here there is now a tendency to rely upon other sources for securing a livelihood.[2]

It will in general, then, be safe to use the term House Community for an extended family that settles upon the land before the formation of a Village Community; and the term Joint Family, for such a group when it lives together as a portion of the Village Community. We may, then, represent to ourselves the Patriarchal Family as the unit from which society springs;[3] hence arises the House Community; this, on its further extension, separates into different allied families, forming a Village Community; within this Community again we have the Family, expanding into the Joint Family, and between these two a continual process of transmutation is going on. It must be remembered that this is an ideal picture; it represents rather a formula which we can apply to different states of facts, than a series of changes which is always to be found. It is indeed difficult to separate in actual cases between the House Community and the Village Community, and to decide which is the oldest. I have above suggested that the form really adopted may depend upon the size of the clan when a settlement

[1] *Early Institutions*, p. 79. [2] *Early Law and Custom*, p. 248.
[3] *Early Institutions*, p. 116.

takes place; but in all the forms with which we are acquainted it is impossible to go so far back in their history, and this for the reason that they have been established long before races of men occupied their present abodes. Thus Sir Henry Maine has remarked that social history begins long before tribal settlement, and that the tribe brings with it its principles of union from an older home.[1]

Hence it is only by an act of the imagination that we can regard these types as successive in evolution. We have really to take them in the stage at which they now happen to be, and consider the historic circumstances which seem to have moulded their destiny. It is thus possible to see how the Russian *mir* has been kept alive for purposes of taxation, and how the Montenegrins have preserved the House Community as the best safeguard against the Ottoman Government. So far as the development of Law indeed is affected, we are primarily concerned with the Village Community, for here apparently we have the origin of Customary Law. But of course the Joint Family is of the greatest importance in tracing the law of inheritance; and in searching for the origin of political power we must keep the Family, the House Community, and the Village Community, in their proper order. For these "disclose to us Political Power in embryo; the Chief growing out of the head of the household; the State taking its first beginnings from the Family."[2]

So far I have traced the change in the clan effected

[1] *Early Institutions*, p. 71. [2] *Early Law and Custom*, p. 242.

by its settlement upon the land. In the pastoral state, indeed, there can hardly exist any law properly so called. In the agricultural state we first find a condition of things in which the land is held in common and enjoyed by means of temporary divisions. Here there is a considerable source of Customary Law in the usages which regulate the enjoyment of the common property, and ensure uniformity of cultivation. Where the land has been divided and is held as private property, we have a new state of things. The old customs still have much weight, but new ones arise, and special regulations are made in order to fix the separate rights of individual owners. This, however, presents us with only one side of the picture. We can understand now the state of society in which Law arose and to some extent how it arose. But we shall not be ready to continue our investigations until we gain some idea of the kind of government under which men originally lived. I have just referred to a passage which suggests the very origin of the political authority of one man over others. It is the development and ultimate destiny of this authority that we must now consider. This is a matter, indeed, which Sir Henry Maine has made peculiarly his own, and I shall therefore merely give such brief outlines taken from his writings, as will put us in a position to grasp with some clearness the political condition of certain typical races.

It is clear that the power of the Chief originally springs directly out of that of the Paterfamilias and is modelled upon it. Thus the functions of the

Domatchin or House-Chief in a South Sclavonian Community are described as follows:—

> The administration of all affairs is in his hands; he allots the daily tasks; he presides at the common meals and distributes the food; he reprimands for faults and delinquencies; he is invariably addressed in language of the greatest respect; all rise on his entrance; no one covers his head or smokes in his presence; no amusement or ceremony commences till he appears or announces that he will stay away.[1]

But though the authority of the Chief is at first of this kind, yet many circumstances combine to withdraw functions such as the above from its sphere, and to render it more like the authority of a military leader. It has been already remarked, that all races with which we are concerned have wandered away from their original homes, and it is upon the occasion of such wanderings that we may regard the power of the Chief as largely developed; the tribe requires not only a leader in the wilderness but a general to lead the attack on the promised land. It has been noticed, too, that as the Joint Family dissolves and becomes a Village Community, the *patria potestas* springs up again in each separate family.[2] Hence the Chief loses the immediate control over families, but gets in its place a control over the heads of families. Moreover, the authority of the Chief is probably never so absolute but that he is expected to take counsel of other men of influence and experience. In early times, when, upon the death of the actual father, the different members of the family remained together and chose one of their number to act as *paterfamilias*, it was

[1] *Early Law and Custom*, p. 246. [2] *Early Institutions*, p. 118.

probably understood that matters of importance should receive the attention of all. Indeed, we know that even in the Roman family, where the power of the father was so absolute, it was not thought proper for him to take any important step without getting the advice of his relatives. Such is indeed actually the case in the South Sclavonian House Community, where the House-Chief is assisted by a Council of Elders. We thus see that though the power of the chief is modelled upon that of the father, yet it tends to become restricted in the above ways.[1]

We have now, indeed, all the usual elements of political society. The unit is the Family under the dominion of the *paterfamilias:* these latter are themselves governed by the Chief; not despotically, however, for the Chief in turn must submit to be influenced by a Council,—a Council of elders where the society is peaceful, of warriors where it is warlike. The point of interest for us lies, then, in the future relations of the Chief and his Council. It is to be noticed, indeed, that one great department of government, that of legislation, is not at all, as yet, within the sphere of the Chief. As soon as rules of law arise they are ascribed to custom, and the Council is the most natural authority for declaring what in any given case this may be. To the same body it is possible for the judicial power of the Chief to be transferred. The great point, then, in determining his future position is

[1] Interesting confirmation of this with regard to a totally different race will be found in a paper on Fiji by Sir A. Gordon, in the *Contemporary Review* for May 1883.

the necessity which may exist for a military leader. Influences are thus at work from the earliest times which confine the Chief more and more to his duties as leader, and the Council of elders probably discover that this is his real office, while they themselves ought to adjust the general relations of the community. We see, too, that when a settlement on the land takes place, there is a great chance for this tendency to take effect. There are now fewer duties for the leader to perform, and more for the Council of elders. The natural course then is for the office of leader to fall into abeyance, and for the affairs of the community to be entrusted to a Council. The original Chieftaincy as a political power was kept in existence by the necessity for combined action under a single head. But in the Village Community, which is formed when the clan settles down upon the land, though there may still be necessity for combined action, yet it is no longer always necessary for this to be entrusted to one individual. I have only, however, been describing a tendency. Whether this tendency will prevail will depend upon the other tendencies that may be working to counteract it. One of these is of general operation; the other is, perhaps, peculiar to certain races. I have said that the office of Chief declines in importance when there are no longer any military duties for him to fulfil. This, of course, supposes that the clan can settle down where it will be unmolested by external enemies. But such a condition of things is seldom realised. Hence, no sooner is the clan settled on the land and the

power of the Chief thus imperilled, than an opposite cause comes into play, and the Chief, who is no longer wanted to conduct the wanderings of the tribe, is still required to defend it against its foes.

I have perhaps said enough to account for the different course which events took among the Hindoos and the early Romans. We cannot, indeed, say that each Hindoo village represents a clan which at one time entered the country and settled upon the land, though we have traces of the immigration of vast numbers of such clans, and Sir Alfred Lyall has described how they are always in process of formation. It is enough for our purpose to allude to those fertile districts of India, where the military spirit either died out or was concentrated at the court of a distant emperor, who only sent his officers round the country for purposes of taxation. Here we still have a dynasty at the head of society, and we may still have remnants of clear organisation under a Chief in different districts. When, however, we get down to the Village Community, the last trace of necessity for this has, as a rule, vanished. Thus even the Rajputs, when they have settled down in a fertile country, lose their tribal organisation, and the power of the Chief disappears.[1] The normal governing authority is now the Village Council. This, indeed, is not of universal occurrence; its place is sometimes taken by a Headman, elective or hereditary, and here, perhaps, we have a relic of clan organisation. But if we consider the stage in which this has passed away, we find that

[1] Sir A. Lyall, *Asiatic Studies*, p. 199.

the Village Council is always received as a representative body, rather than as a body possessing inherent authority, and we have a modern democratical State in miniature.[1]

If now we regard the condition of a nation composed of a multitude of such communities, we arrive at an interesting result as to the distribution of the powers which we usually ascribe to the Sovereign. We have indeed a central authority in the person of the Emperor, and to him, speaking generally, the management of military affairs belongs. The different portions of the nation are thus able to settle down in peace, and hence we get the Village Community managed by the Village Council. Just as under a modern government, the individual can dispense with his castle; so, though of course the parallel is not perfect, under the old Indian governments the village could dispense with its Chief. But even here we can see how essential is the distinction between them. I have above pointed out that the duties of the Chief tend to become merely administrative, and that his influence is excluded from private life. In this germ we see how it was that the old Indian governments were solely administrative, and how legislation with regard to the internal affairs of the community was never thought of.[2] A Western government such as that of England, on the other hand, has been submitted to completely different influences. Here there has been a tendency from the earliest times to throw not only administrative, but also legislative, authority into the hands of the central power, and

[1] *Village Communities*, p. 122. [2] *Early Institutions*, Lect. xiii.

thus we arrive at the essential point of the Austinian analysis.

If, again, we turn to the early condition of the Romans, we must, indeed, trust largely to conjecture; but though we have to establish our point of view in this way at first, we shall find many results of it which raise its original probability to a fair position of certainty. We have seen that at the moment of settling down on the land the position of the Chief is at once imperilled. Amongst the Hindoos this danger is realised because the Village Community has no need of defensive or offensive organisation. With the Latin tribes it was far otherwise. In what form they originally came into Italy, whether as detached bodies, or in one vast army, we can hardly say; but it is certain that they never settled down into that inter-tribal peace which seems to have characterised the Hindoos. This we must ascribe partly to their warlike character, partly to the scanty space at the command of each tribe. For the truth of the first assertion, we need only point to the continual wars in which the Latin tribes were engaged; for the truth of the second, to the exceedingly narrow boundaries of the original Rome.

> In the landward direction they were on an average just about five miles distant from the capital of the canton, and it was only toward the coast that they extended as far as the mouth of the Tiber (*Ostia*), at a distance of somewhat more than fourteen miles from Rome.[1]

We thus see that there was no time when the

[1] Mommsen, i. 104.

necessity for a leader could die away, and hence we meet with a King at Rome from the earliest date. As to the position and authority of such Kings there is much controversy. According to the view I am here adopting, he was nothing more than a military leader, with perhaps some slight additional weight in the tribal councils. This position, however, was one which successive Kings used for their own aggrandisement in various ways, till the patience of the Roman spirit was exhausted. The office itself was then abolished, and the progress of the Roman commonwealth, which had been only disturbed, not materially affected, by this episode of the Kings, went on. To this matter I shall have occasion to return, but for our present purpose enough has been said. The tendency, in obedience to which the office of Chief would have died out, was arrested, then, in Latium by the continual tribal wars. The direction subsequently taken varied in different cases. With the Romans the chief was at first a ruler elected for life. This position, however, was found to be one of too much authority; and since leaders were absolutely necessary, it was deemed advisable to choose them for short periods only. That government in this manner was possible, is due to the singular power of coherence in the Roman state, a power which produced, as time went on, a uniformity of action which is almost without parallel, and which is the more astonishing on account of the multitude of officers with co-ordinate authority, to whom the management of matters was entrusted.

So far we have considered only one cause which has counteracted the tendency in the power of the Chief to decrease as soon as the clan settles upon land, and this is one of universal operation. In certain cases, however, another principle has come into operation, which has had the greatest effect upon history. Where the tribal organisation is preserved, the Chief is usually elected from one family in whose veins is supposed to flow the purest blood of the founder; and when, after the settlement upon the land, the Chief permanently retains his power, the loyalty which the members of the clan bear to him is of the greatest importance. We have seen that among the Hindoos the Chieftaincy died out, and hence this loyalty passed away with it. Among the Romans, indeed, the Chieftaincy was retained, but, for reasons which are unknown to us, the reverence for a particular family seems to have died away. Hence in following Roman history we are in general able to dispense with such considerations. Among other Aryan races, however, the reverse is the case; the Chief has survived, and the loyalty of his tribe has been a great factor in increasing his power. The existence of this state of things has been shown to exist in Rajputana;[1] we are well acquainted with it in Teutonic and Celtic societies; and it is upon this that the great modern States have been largely founded.

Not only, then, did the tribes of these races find a leader indispensable, but they had a special respect for the members of certain families which induced

[1] *Asiatic Studies*, chap. viii.

them always to take the leader from those families. In other words, we have to take into account in their case the sentiment of loyalty. With the Romans, as we have seen, the king was supported for reasons of expediency. With the Celts and Teutons, to have a chief was equally a matter of expediency, but in addition to this there was a habit of obedience to the members of a particular family, and a sentiment of loyalty towards them. This sentiment, of course, was not paramount. The Chief must in any case be a man fit to rule, though when this necessity could be satisfied he must be taken from a certain house. We need not be surprised to find, then, that not only was the Chieftaincy never in danger of dying out, but that the concurrence of tendencies produced an opposite result. From the beginnings of reliable history we here see the power of the Chief on the increase, and it culminates at last in the autocracy of the great Sovereigns of the Middle Ages.

The development of power is of course intimately mixed up with the development of Feudalism, a subject with which we are not here concerned. It seems, however, as if this sentiment of loyalty was the factor in society which made it possible for it to recombine after the fall of the Roman Empire and the anarchy of the Barbarian invasions. Upon this recombination the example of that Empire worked, and hence, passing through the stage of Feudalism, we arrive once more at the Roman conception of a State composed of citizens in a state of equality.

CHAPTER VI.

THE LEGAL ASPECT OF THE VILLAGE COMMUNITY.

I HAVE given this sketch of the primitive condition of society, in order that we may see how there gradually arose the modern conception of Law with all its correlated terms. For this purpose I shall next consider the legal aspect of a Village Community in its purest state, where Custom is the sole source of law, and before private property has been introduced; and I shall consider the legal results that follow when such a Community expands into a State, when private property is introduced, and the ties of kinship are broken down. In this way I shall try to show how the first terms that appear in fact, whether they are expressed in words or not, are those of Law and Duty; how Rights arise with the separation and consequent inequality of interests, and how from this springs a new kind of law for the regulation of Rights; and how, finally, the Sanction of the State is introduced to enforce the Law and put an end to private redress. Before attempting this, however, it will be well to explain the exact position I propose to take up. Sir Henry Maine has said that, in the sense of the analytical jurists, there is neither Right

nor Duty in any Indian Village Community;[1] and more recently, again, that the Romans had not attained, or had not fully attained, to the conception of a legal Right.[2] Now, as the following chapters are intended to trace the rise of the idea of Duty in the Village Community and of Right among the early Romans, it would be improper to make any such attempt without considering how our course is affected by remarks like the above coming from so great an authority. I have already noticed that Sir Henry Maine accepts the Austinian analysis as a good working theory of law, and I have referred to the opinion he expresses as to the influence that a system of law, worked out on this theory, has among a people to whom it is perfectly new. The rules of law acquire a precision and hardness which they never before had in practice, and the idea of individual Right which springs up everywhere attracts the natives to the courts in crowds. When, then, he speaks of the ideas of legal Right and of legal Duty as not existing in ancient times, it may be readily admitted that they had not acquired that distinctness and that complete dependence on Law which Austin has procured for them; we may even admit further that they do not exist distinctly as ideas which require to be spoken of and to have separate names; everything may be included under the common notion of *jus*, that which binds. And yet it would be hard to deny that feelings spring up corresponding to the sense of Duty and to the sense of Right.

[1] *Village Communities*, p. 68. [2] *Early Law and Custom*, p. 365.

It must be understood, then, that in the following remarks I am trying to trace the origin of these feelings, and the manner in which they come to depend upon Law. When the latter has been fully developed it may then be advisable to work backwards again and deduce from it the conceptions of Right and Duty. All that I at present maintain is, that it was only because men were already conscious of a sense of Duty that they devised Laws to define it, and only because they were conscious of a sense of individual Rights that they imposed Laws to regulate them. I am thus reversing the terms in the Austinian analysis, and must claim indulgence for any obscurity thereby introduced; but this seems to be necessary if the term which Austin puts first is only the result of a gradual evolution.

If now we consider what are the great distinctions, so far as Law is concerned, between a primitive society of men and a developed one, we shall find that they consist in two chief points; these are, the different nature of the relations existing between individuals and the different ties by which these individuals are bound together. The first point affects the substance of Law, the second is concerned with the method of enforcing it. Of these I shall treat separately, and shall consider first how the substance of Law is affected by the condition of the society in which it exists.

It is well known that the effect of civilisation is to withdraw man more and more from direct contact with Nature. In the primitive state he seems better to realise his condition and unconsciously to adapt

himself to it; but as the society in which he lives increases in numbers, and the share of work assigned to each individual becomes more and more specialised, he loses this power of unconscious adaptation, and has to call reason to his help to avoid the calamities that would otherwise overtake him. This unconscious adaptation in a primitive society is the source of Customary Law; the conscious adaptation in an advanced society is the source of Scientific and Statute Law. It may be well to develop this idea further.

The smallness of the Village Community produces two results. It enables the society by a proper and natural division of labour to supply the wants of the various members, and it makes it possible for each member to see how necessary for the general good is his own work and that of every one else. Hence we arrive at a highly organised society in which, nevertheless, there is as yet no division of interests. We may see here the source of two kinds of rules. The natural adaptation of which I have spoken above produces a certain kind of agriculture. There are at first no rules that such and such a crop shall be sown and such and such a field kept fallow. These things are done without conscious regulation, because actual and continuous contact with Nature has gradually prescribed them. Again, the natural operation of the law of the division of labour induces now one and now another to devote himself to a special branch of work. The same calling is naturally adopted by their children, and thus we have the origin of rules of caste, determining as they do the trades of

members of the community. In this state of things, then, each member follows a particular calling because he was born to it, and, if he is an agriculturist, he follows special methods of agriculture because he has been accustomed to these from his youth. The course which will be taken by such a society is various, but under favourable circumstances it may continue for a long time in this condition. These circumstances require that the society should remain small, that its members should possess no great energy or independence of character, and that it should be unaffected from without. One important change, however, that in this case comes over it must be noticed. The process of adaptation to which I have referred is not a continuous one. The community, which at first changes with but little difficulty, finally arrives at a mode of life which suits the conditions in which it finds itself. Its period of plasticity and its power of self-adaptation then come to an end. In future, when doubt arises on some point of practical life, the only method of settling it is to refer directly to past practice. The people, having lost the power of change, are content to realise the actual customs according to which they live. This is the origin of Customary Law proper. A doubt arises as to the method of cultivating or partitioning some land, and it is no ordinary exercise of human talent when some village elder expresses in words the habit which all are conscious of having followed, and makes a rule by which he may decide the new case. When the community is in this condition we have the primitive state of Law

so far as its material is concerned. Human reason makes no attempt to compose its substance. Its office is confined to discovering and formulating what this substance really is. All Law at every stage is meant to assist in bringing man into harmony with his surrounding conditions. At first he brings himself into this harmony by the power of self-adaptation of which I have spoken. Hence the first effort of Jurisprudence is to give form to those habits and customs which have been naturally evolved. Of course a time comes when new conditions render this blind attachment to ancient customs impossible; some totally new case arises which calls for a wholly original class of rules. A good instance of this is the case alluded to above, when the British Government in India brings a system of irrigation to a village and leaves the village authorities to assign the different shares to the various members. But though the rules in this case are clearly composed by the Village Council, yet we are told that so prevalent is the idea that all Law originates in Custom, that even these have the same foundation ascribed to them.[1]

It will be convenient in following out the different stages of legal development to keep clearly before us the different terms of the Austinian analysis. Law, according to this, is the command of a Sovereign; it composes Duties and thereby sometimes confers Rights; and it is enforced by the power of the Sovereign. To the condition of society which we have been examining this is clearly inapplicable. Law

[1] *Village Communities*, p. 109.

has its source in Custom. There is no desire on the part of the Village Council to impose anything new. Their only wish is to discover what has always been, and to ensure its continued observance. The direct contact with Nature, which the society had in its early state, has produced the habits best suited for its preservation. From these habits, therefore, it seeks to deduce its laws. When we enquire whether laws of this kind can be said to impose Duties and to confer Rights we must distinguish. We can hardly suppose that labour is ever so pleasant to man as to prevent it from being occasionally irksome; so far then as a village custom assigns to one man a particular kind of work and expects him to do it, we may say that a Duty is imposed upon him; but so far as the rules merely regulate methods of agriculture and so forth, they probably appear to the members of the community too perfectly natural for the idea of Duty ever to arise. This is still more the case with regard to Rights. I have already alluded to the fact that, although the community may be highly organised, yet the function of each member in the little commonwealth is apparent to all. There has arisen so far no conflict of interests: the advantage of one has not to be balanced against the advantage of another; each has his proper task allotted to him, and each has his proper reward in the shape of an assignment of land or of a share of produce. Hence the idea of individual Right does not arise.

Finally, we have to consider the Sanction by which the law is enforced. Here we must recur to

the peculiar condition of the society we are discussing. It is not only small, but its members are either actually bound together by the ties of blood or are assumed to be so bound together. Hence public opinion has a force which is quite sufficient to do away with the necessity of any sanction such as we conceive it. Sir Henry Maine writes:—

> More than all, customary law is not enforced by a sanction. In the almost inconceivable case of disobedience to the award of the village council, the sole punishment, or the sole certain punishment, would appear to be universal disapprobation.[1]

The result of all this is, that in the Village Community, in its purest form, there is no Sovereign, there are no Rights, and there is no Sanction, properly so called. There is a law, indeed, but this is not the result of human legislation. The requirements of life have in the early plastic state of the society developed certain habits and customs. So soon as the power of unconscious self-adaptation is lost, it is necessary to give to these expression; hence we require a jurist, but his function is merely formal. He observes these customs, and draws from them a rule. We have thus a system of Customary Law established, probably by the Village Assembly, but their office is solely to declare the Law, not to enforce it. In general, its rules are obeyed as a mere matter of habit, and if any member does feel disposed to shake off their control, the fear of the disapproval that awaits such a course is sufficient to prevent him. I have above adverted to the fact that some rules are really

[1] *Village Communities*, p. 68.

not the result of Custom, but are consciously imposed by the Council; hence we have, occasionally, legislation proper; and Professor Holland enquires what, after all, is to be done, if disobedience to the ruling of the Council actually occurs.[1] The former case is glossed over by a fiction. We assume that these rules, too, are derived from Custom. But the latter is not of a nature to yield to fiction. At this point a Sanction proper must be introduced, and we must look somewhere for the power which ultimately exerts the necessary force. But the truth is, that when we arrive at these results we have abandoned the primitive state of society and are on the highway to another. It may be impossible in actual life to draw the sharp distinctions which are here laid down, yet none the less valuable are they as affording us landmarks in the progress of Law. Thus the Russian *mir* by no means answers to such a society as that which we have been describing. It is itself regulated by the Imperial laws, and we are told that it once employed a short and sharp method with offenders.

Formerly the method of overcoming the resistance of obstinate members, or of getting rid of incorrigible idlers, was to hand them over for the conscription. The fathers of families, in conjunction with the *starosta* (mayor), thus purged the community of all recalcitrants.[2]

But it is impossible to map out the different stages of human development without seizing certain salient features, and using them as marks to guide us. Such stages are never separated from each other by a hard and fast line; the earlier is prolonged far on into the

[1] *Elements of Jurisprudence*, p. 41. [2] *Primitive Property*, p. 19.

later, and the different ideas peculiar to each touch and blend at many points. It may be repeated, then, that the original source of Law is Custom, that it confers no Rights though it may impose Duties, and that it requires no Sanction to enforce it. If it is enquired why Custom is the sole source of Law, I reply that man is in that stage when he has ceased to adapt himself unconsciously to the needs of life, but has not yet learned that reason was given him that he might continue the process consciously; he assumes that the substance of all Law is incorporated in the customs of his forefathers, and it is enough to examine these and frame rules upon them. If it is enquired why there are no Rights, I reply that the mutual relations of all the members are still so simple that the functions of each individual are clearly recognised by all, and there are no conflicting interests which have to be adjusted by a calculation of separate Rights. If it is enquired why there is no Sanction, I reply that the ties of kinship, real or assumed, and the smallness of the Society, keep the individual under a perpetual surveillance which is enough to check any desire to transgress. If it is objected, finally, that no society ever existed in which these various attributes are found, I reply that recent enquiries show that this state of things has been more or less completely realised, and that this is sufficient to justify our taking such a society, ideal though it be, as the original starting-point for legal conceptions.

I have used the term Jurisprudence to denote the expression in rules of the Law of such a society,

and it is clear that we are quite justified in doing so. Its position may be low, and its functions, according to our ideas, simple; but its position is no lower than that which the school of Austin assigns to it, and it is possible that the original formulation of a few customary rules represents a considerable effort of human genius. Given a mass of Law existing in Custom, the problem is to express it in rules suitable for application. When the first attempt to do this is made we already have Jurisprudence existing as a formal science.

But further, I have stated that the object of the science of Jurisprudence is to regulate the relations existing between man and man in accordance with the general sense of justice. It is clear that in our original society this is done to perfection. Men's ideas of justice are always regulated to a large extent by custom, but originally this is the only standard to which they conform. That which is customary seems right; but the only task of Jurisprudence is to produce rules to express what is customary, hence, if it fulfils its mission with any success, its proper object will be attained. Custom represents to the people what is just, and from custom the Law is taken. Law and Justice have the same standard, and it is probable that as a rule they will coincide.

There is a further point that we must notice. One of the chief merits in the Austinian system is the clearness with which it separates legal from moral and religious rules. The legal rule is imposed by a human Sovereign, and is enforced by a legal Sanction.

But in the system I have been describing both these marks are wanting; are we then justified in saying that we have anything here which corresponds to our modern ideas of Law? If this question is to be answered in the affirmative, it is clear that we must seek elsewhere for the distinction between Law and Morality than in their source and in their sanction. I shall not, at this stage, attempt a full explanation of this matter; for the present it must be sufficient to say that the distinction is to be sought, not in the source or the sanction of the rule, but in its subject-matter; the rule of law is merely appendant and supplementary to the rule of morality. Thus a rule of morality says "thou shalt not steal;" the rule of law draws the line between my property and yours in order that we may know how to observe the rule of morality. It is true that with this test it may seem hard to distinguish between Law and Morality in very early times; every rule is alike sanctioned by immemorial custom, and it may be a greater offence against Morality to lose caste than to commit murder. Yet caste in its essence belongs to Law. I have just instanced as a rule of morality the prohibition against theft; but in primitive times, before the institution of private property was established, we require a different rule to this, and one which must be introduced again if ever the dreams of socialists are to be realised; I mean the rule of diligence. It is through the practical failure of this rule that private property may to some extent be supposed to have arisen. In early times, however, it must have been

one of the first importance. Assuming, then, that such a rule of morality existed, it would be the province of Law to assign to each man his appointed task, and this, indeed, was done, when by rules of caste every man's occupation was strictly defined. We have, however, an illustration of what has been said above, that there is here really no conscious distinction between Law and Morality, in the fact that these become moral rules of the strictest kind, and survive as such long after the institution of private property has made them unnecessary. We may say, then, that as long as custom is really the only source of Law, there is, to the people themselves, no distinction between Law and Morality; for all rules carry with them that idea of necessity which is of the essence of Morality, and are quite devoid of the idea of expediency which is of the essence of Law. But if we look back upon this state of things with our modern notions, we can introduce the idea of Law at two points. In the first place, we see a division of subjects which corresponds to a division we recognise between Law and Morality; thus we should say that a rule of inheritance was a rule of law, though a primitive Aryan would have placed it on the same level as all other rules. But more legitimately we may say that when the reference of the rule to Custom has become a mere fiction, as in the case mentioned above, here we have Law proper as distinguished from Morality. This, indeed, is perfectly true, but then as soon as this fiction has crept in we have begun to leave our primitive society and to develop into a new one. It seems clear, then,

that under a system of Customary Law, pure and simple, there can be no conscious separation of Law and Morality. This is only possible when men begin to see that some old customs may be broken with advantage, while others must be retained, and when this process is furthered by the conscious construction of new rules to govern new cases. After this, the differentiation between Morality and Law is continually going on, and while Morality depends always on custom, Law appeals more and more to expediency; until finally we get the plain distinction that Morality is that which every man is assumed to know, Law is that which he may require to be taught. But although in this primitive stage we can find no distinction between Law and Morality, yet it would be wrong to say that Law has here no place. This is the beginning of things which makes the subsequent development of Law possible. It is here that man acquires the notion of Law as something possessing an inherent force which is wanting to the merely temporary commands of a Father or a Chief, and it is here that he acquires the habit of acting in accordance with a sense of Duty, a habit upon which, far more than on the Sovereign's power, the future realisation of Law really rests. While, then, we may say that at this point there is no conscious separation between Law and Morality, we need not exclude this primitive stage from our views of the evolution of Law. If Law as a distinct system is not yet apparent, it is here that the way is prepared for its future appearance; and, as we shall presently see, it is amid a com-

munity that has long submitted to Customary Law that a more independent system has the best chance of growing to maturity.

It must again be repeated that the picture I have drawn above has been intentionally idealised; hence it is not affected by the fact that the Hindoos did actually arrive at a real distinction between Law and Morality, and that this is reflected in the later codes. The picture, so far as it is true, is true of the actual primitive community, and this may be quite unaffected by the ideal laws which have been manufactured by the priests. These may, in course of time, come to be imposed upon the people, but then we have an entirely different condition of things from that which we have been describing, the condition in which men conform their actions to the rules not of Custom but of a divinely given Law.

In course of time, however, the state of things which I have been describing passes away. For this there are many reasons, but I may mention as being the most influential among them, the introduction of separate property, and the weakening of the force of public opinion by the increase of the society and the relaxation of the ties of blood. The former introduces the idea of individual Rights as separate from the general interests of the community; the latter renders transgressions of the Law possible, and makes it necessary to devise some definite means of keeping them in check. I may perhaps hazard the remark that the direction which Law will take depends upon the relative rapidity of these innovations. If the idea of

individual Rights gains ground while the power of public opinion is still strong, and if they have the general assent of the community, we shall have that development of Law which is most favourable to its independence of the State power. We must never lose sight of the fact that the natural development of Law has, in most cases, been seriously interfered with by conquests, and it is immaterial whether the government thence resulting professes to rule solely in its own interest, or also in the interest of the conquered people. The special value for our purpose of the early history of Rome consists in the fact, that these disturbing elements are less prominent there than elsewhere. I am not, of course, asserting that the development of Law under a conquering race is unnatural; this, indeed, is of too frequent occurrence to be denoted by any such term. Our desire is to see how far Law can be developed in entire independence of the power of the State, or, at least, with the mere assistance of this in cases of necessity. We have started from the assumption that Law in its normal state corresponds to a certain common sense of Right residing in the people, and that upon this it rests in the last place for its support. In tracing its normal development, then, we cannot take English Law as our example, because this has been seriously perverted by the original conquest of the country, and has become indissolubly bound up with the State power; nor can we take the further development of the Village Communities of India under the influence of the British Government, for here we have the establishment of

strict law before the moral sense of the people has made them capable of properly using this advantage. In the former case we may say that the rights of individuals are not recognised sufficiently to satisfy justice; in the latter, that this recognition goes a long way in front of popular opinion.[1] In brief, we may say that at Rome we have, so far as we can judge, the best example of the slow growth of Law in accordance with the common sense of Right, of Law relying, in general, on that sense of Right for support, and only gradually falling more and more under the influence of the Central Government, as the character of the individual citizens declined and the power of the Empire grew. The influence of this Empire, both in its law and in its power, has too strongly influenced modern nations for us to go to them for the illustration we are now in search of. I have already pointed out how, in the Village Community, we have the first appearance of Law as set by Custom, and of Duty as depending on Law. I am going to search for the other terms of the series in the legal history of Rome. We shall there see the origin of individual Rights and of rules of Law regulating these, rules arising partly in Custom, partly from a direct appeal to the sense of Right. This process goes on while public opinion is still in general sufficient to maintain the Law. When, however, this finally declines in influence, we must search elsewhere for means to enforce it. These are found partly in religion, partly in the power of the State. Hence we have to consider the origin of

[1] *Village Communities*, p. 73.

actions at Law, and how these all fall at last under the Civil Power. In conclusion, we must see how Law itself gradually changes its nature; how it passes under the influence of Jurists and of the State; and how, finally, it is placed entirely under the control of this last. We shall then be in a position to understand the views which modern Jurists have taken as to the object and position of Law, and if we cannot reconcile them, we may at least get a clear idea of the differences which separate them. As, then, in the Village Community we have looked for the rise of Customary Law and the Sense of Duty, so among the Romans we look for the origin of the sense of Right, for the introduction of legal Sanctions, and for Law in its two forms of Scientific and of Statute Law.

CHAPTER VII.

THE ORIGIN OF PRIVATE RIGHTS.

FEW things are more interesting than an examination of the origin of Law in Rome. It takes its rise in a state of society utterly different from that which prevailed in the villages of India, and at the same time utterly different from that of which we have any experience at the present day. Law in the Village Community was something which the individual instinctively obeyed, his only reason that all his ancestors had done so, so far as he knew, before him, and certainly all his companions did so now. There were many distinct rules which regulated his acts, but they existed altogether outside himself. The idea that he could control these rules, just as much as they could control him, had not yet arisen. If, however, we place ourselves at the very beginning of Roman society, we find that all this has been left behind. That the Romans at some stage of their history, in Latium or elsewhere, had passed through this state cannot be doubted, but their history is important to us because they passed beyond it. Customary Law, if submitted to, rivets its fetters upon a people; if not submitted to, these fetters are soon thrown off, and the next stage begins. In all this

much is due to the native temper of the race, and much to surrounding circumstances. The Romans early displayed an independence of character which decided their whole career. Hence with them the Village Community was merely a transitory stage. When we first come upon them the old order of things is dissolving and is giving way to a new one. Now the chief point in the old order of things lay, as I have already remarked, in the close intimacy of the individuals, produced by community of blood and community of interests, or by kinship and common property. The new order, then, is due to the relaxation of the ties of blood and the rise of separate property. This relaxation of kinship, however, is only partial; the rise of separate property does not at once abolish common property. Two causes, nevertheless, give rise to that independence of the individual which now becomes the characteristic mark of society. In the old order the individual had not emerged from the close union of the community: in the new order he has thrown off most of this influence, and though, if not a *paterfamilias*, he is still in the circle of the family, yet he has to a large extent acquired independence. But this again in its turn is only a transitory stage. Independence brings with it its own inconveniences, and we pass rapidly on to the third stage, in which the individual is bound to a large extent to merge his own will in the common will of all, to become a subordinate member in a State. In the first stage and in the last man is equally subordinate; but his subjection in the first is due to instinct; in the third, if not due to reason, it is at least sanctioned by it. The simple relations of the

Village Community are arranged, not perhaps without foresight, but largely by a gradual and unreflecting perception of what is best adapted for its preservation. Man, in an early state of society and living in direct contact with nature, is either quick to perceive what practices will conduce to his welfare, or is at least beaten in the struggle for life by those who perceive this more successfully. The members of a Village Community are therefore all subordinate, but subordinate to a mysterious power which they do not understand, which dictates to them their customs, and to which they render obedience. In the second stage man has escaped from this subjection to instinct. He now regards himself as the arbiter of his own destinies, and lives in a state of equality with others who are in the same position. But this cannot last. He soon discovers that the community of interests which instinct taught is no less prescribed by reason. Hence he passes again into a state of subordination, but now it is continually regulated by foresight and contrivance. The Village Community was a natural organism: all the parts obeyed their proper laws, but the whole was governed immediately by Nature. The early Romans were in a state of mere transition, and were the beginning of a Political Community rather than such a Community itself. The State is a machine: here again all the parts obey their proper laws, but the whole, though governed of course ultimately by Nature, is governed immediately by man: all the arrangements are made with human foresight and calculation. Each of these stages is full of interest, and certainly, not least so, that

intermediate one from which has arisen the state of things in which we ourselves live. It is not of course intended that all peoples pass through these three stages; they do, however, serve as types to which all more or less conform. If, now, we consider the legal aspects of these three systems, we shall find important distinctions. In the first, as we have seen, there is no marked feeling of individual Right. The first idea that presents itself is that of Customary Law, binding the individual to sundry acts, and thereby imposing upon him Duties. He takes his share of the produce of the soil indeed; but as this follows as a matter of course, and no one attempts to deprive him of it, he does not realise it as a Right; a Right, indeed, is often not realised till it is violated. The acts he has to perform, however, cannot fail sometimes to be irksome to him: in other words, he feels them binding upon him as Duties. In this state then, if we may be allowed the expression, all Law is Public Law; there are no Rights except such as the community owes to the individual, and the influence of Law is felt only in the Duties it imposes. In the next state we start from a different point; not abruptly, indeed, for Customary Law does not at once lose its sway, and the change, like all the processes of Nature, is a gradual one. Another idea is introduced, and in the case of the Roman people we seem to be able to trace it largely to their warlike character and habits. While the Roman is still cultivating his plot of common land according to fixed rules, and taking his share of the produce in accordance with custom, without feeling that there is a Right which

specially belongs to him, and which needs defending against the world at large, he is getting other ideas of acquisition. When he goes out on a foray and brings home cattle and slaves as his booty, he now feels that a distinct Right in these things attaches to himself by virtue of the strength and valour that won them. Toil in the field every one engages in, and from this every one reaps his due reward. But here is something in which he differs from the rest. He has got an advantage which they have not, and as his own right arm has won it, he experiences a certain privilege in his possession of it, the feeling of which lies at the foundation of Roman Law. It is hardly correct to object to this that it is a mere confusion of Might and Right, and that we cannot attach much weight to Rights which spring from mere lawless anarchy. With the Rights in question it is not so. Men in those days are governed much by Morality, and the Morality of the time favours this plundering of strangers. It is not by stealing from one of his own clan that the Right arises, even supposing that in very early times such a thing is ever done. But the world outside the clan is fair plunder, and the prize thus obtained is, according to primitive notions, earned quite as honestly, and certainly far more honourably, than the fruits of the field.

There is also a certain intrinsic probability that the idea of separate ownership will arise in this way. The owner first realises his Right when he sees the difference between himself and other men. But so long as the community restricts itself to agriculture, this difference is not felt, since every one gets his fair

share of the produce. Labour in the field brings its due reward to all, but valour in war brings its special prize to the warrior who excels in it. The same idea then, which in the present day founds ownership upon labour, in those days founded ownership upon valour. What his own right hand had won for him the conscience of the capturer approved that he should keep. The tradition of this state of things was kept alive in the ceremony of the *actio legis sacramento*, and Gaius explains that the wand was used there to represent a spear, because the best title to ownership was founded upon capture from an enemy.[1]

It is in accordance with this that the earliest Roman property consisted of such things as it was worth while to make a raid for, slaves and cattle (*familia pecuniaque*); and that the original word for property denotes that it has been captured by force (*mancipium*, *manu-captum*). So, again, when the idea of a friendly transfer of property arises, this must be assumed to be a transaction of the same kind, and as a later fiction evades the difficulties of law by a friendly action (*jure in cessio*), so in primitive times a sale seems to have been effected by a friendly capture (*mancipatio*). The frequency of this act of seizure seems, too, to have demanded a corresponding copiousness in words. It is signified at first also by *emere* and *rapere*; and when a more civilised age learns to distinguish between different kinds of taking, the former is promoted to denote purchasing, and the latter, as soon as robbery loses

[1] Gaius, iv. 16.

its credit, is degraded to the idea of plundering.[1] This prominence of force as the foundation of special privileges among early peoples is of course well known; attention has been called to it in several places by Sir Henry Maine, and especially in reference to the confusion between the ideas of kinship and of subjection to a common authority.[2] It will not be necessary for us to go through the evidence on this point. It lies in the marks which early ideas and manners have left on language, on religion, and on customs, and these are adequately treated elsewhere.[3]

It is sufficient for us to recognise how the idea of force lay at the root of old Roman ideas, and not least at the root of their ideas on Rights. Within the circle of the clan, matters were still governed by the law of custom, and the instinctive obedience paid to this prevents, as we have seen, the feeling of separate, individual Rights from arising. But when the warrior goes outside his own clan, the booty which he then captures comes to him as his own, and we thus have the foundation of a new system of law. The case, of course, is slightly altered when we consider spoil taken by the combined warriors of the clan, for this must be divided by the leader amongst the individuals, and some reserved for those who have stayed at home. But this, if not a later development, at least allows room for the other system to flourish by its side. In fact the whole thing has

[1] Ihering, *Der Geist des Römischen Rechts*, i. 110.

[2] *Early Institutions*, p. 68.

[3] *Early Institutions*, p. 312; Ihering, *Der Geist des Römischen Rechts*, i. 113; Mommsen, i. 175.

existed down to modern times, and *prize of war* becomes the captor's property now as it did in those early times. We are not accustomed to conceive of Drake's sailors as feeling many stings of conscience when they plundered a Spanish galleon, and they probably looked with much complacency upon the property which they acquired by this very ancient title. The fact is, that inter-tribal relations then were carried on, as international relations are now, according to certain rules, rules indeed which sprang more immediately out of the state of morality of the people than do the rules of modern diplomacy, but which were none the less perfectly well known. It is possible, indeed, that we ought rather to speak of rule than rules, for the practice even of much later times is summed up in the maxim, "*quæ ex hostibus capiuntur jure gentium statim capientium fiunt.*"[1] But though the rule is thus simple, it is not uninteresting to trace the course of events by which it is seen to be the germ of modern International Law. This rule, carried out originally between tribe and tribe, gives rise to the notion of separate property. The idea thus introduced within the tribe is the foundation of a large part of Private Law. From so small a beginning do we obtain finally the opinions of Papinian, of Ulpian, of Paul, and a great part of the Digest. Finally, the idea of Law and Order makes its way beyond the confines of the nation, and asserts its claim to rule in international affairs. The Roman Law then, that has been maturing all this time under the shelter

[1] D. 41, i. 5, 7.

of the State, once more returns to that wider sphere from which it started, and is accepted as the foundation of International Law. If, between nation and nation there is still no arbiter to avert bloodshed in the last instance, yet there are at least rules which tend to defer such a catastrophe, and which mitigate its evils when it does come. I shall have occasion further on to show how this foundation of Rights upon violence was not connected as a rule with violence in private life. Forcible though it was in its origin, yet this none the less commended it to the conscience of the acquirer and the assent of his companions.

We thus see the sense of individual Right in its very origin. In the previous state of legal conception we have seen that we can detect Law, because there exist rules to which men conform their actions, and Duty, because these rules, even though uniformly obeyed, cannot fail to be at times irksome; but that the sense of individual Right has not yet arisen. Yet even while this is going on a change is begun. The individual who within the tribe obeys these laws and performs these duties, and obtains such reward as is common to himself with everybody else, finds that outside the tribe he can introduce a difference between himself and the rest; his valour can win him booty which shall belong to himself alone, or at least to his family. There is here then at first no Law; there is only the sense of individual Right. Law springs up afterwards to regulate the Rights which are thus already in existence. There is also no corresponding Duty; for the Right thus obtained commends itself

equally to the approval of the rest. This we see by the idea of honour which is at first held to reside in the title of *robber*. We may, indeed, suppose that those plunderings which constitute a violation of property, which go on within the tribe and come under our modern notion of robbery, are at first unknown. There is, therefore, no attempt at infringing the Right. It may be objected that, as I have remarked above, a Right is often not realised till it is infringed. But the objection here would be useless. For the feeling of individual Right to arise two things are necessary; there must be the positive enjoyment of some advantage, and there must be a consciousness that others are without it. In the old Village Community we have the first factor, but the feeling of Right does not arise because the wants of all are simple and are alike easily satisfied. The tillage of the soil does not call forth the different qualities of men so as to show the essential differences that nature has placed between them. At first the bountiful soil yields an equal return to the simple labour of all. But in the fight man discovers his personal advantages; a different result accrues to each according to his strength and valour; and if discontent should arise at the separate ownership ensuing therefrom, it is stilled by the general applause which bravery wins, and the shame which prevents the less successful from calling attention to their misfortune. We may regret that the earliest Rights should be founded on violence, and indeed this fact brings its own evils in its train. As the tribe increases, and the bonds of

kinship are relaxed, a lesson is taken from that system which prevails against the world outside. Plunder and robbery against other tribes are followed by theft and violence within the tribe itself. Then we have the other terms of the legal analysis introduced. Laws are required to protect Rights, and this is effected by imposing Duties and threatening Sanctions. In spite, however, of these consequences, and in spite of their objectionable origin, it is important to seize clearly the idea of Right in this its most elementary form. The individual bears in himself the foundation of his own Right. This has been denoted by ascribing the origin of the Right to the subjective will of the individual.[1] Now Law, when it comes, exists for only two objects, to regulate Rights and to protect them. Here the Right is so simple that it requires no regulation, and it exists by the common consent of all, so that it requires no protection. These considerations are of importance for deciding upon the ultimate elements of Jurisprudence.

But though we ascribe the origin of individual Rights to violence of this kind, yet we must notice also the other influences that are at work. For this purpose we find instructive illustrations in the actual manner in which the common property of the House Community and of the Joint Family in the present day is always tending to division. Wherever one member is conscious of contributing more largely than others to the common fund, he becomes reluctant to lose the advantage of his personal skill.

[1] Ihering, *Der Geist des Römischen Rechts*, i. 107.

Thus, even in Montenegro, spoil of war is retained by the taker, and on the Adriatic coast the profits of distant maritime trade have from time immemorial been reserved to seafaring members of these brotherhoods.[1]

In the same way it is on the question of trading profits that the Hindoo Joint Family is most liable to dissolution. These cases have a special interest in connection with Mommsen's theory that the site of Rome was selected for its maritime advantages, and that commerce held a high place in early Roman life. The combination of these two causes, the separate ownership in prize of war and in profits of trade, may have produced that early realisation of private property in all its distinctness, which is specially characteristic of Roman Law.

We are thus led to the axiom that differences in property arise because there are differences in individuals, and these differences may be shown in many ways. In the present day they are shown by differences in manual and intellectual skill. In primitive times, however, the chief means of showing personal superiority was in the battlefield, and in the battlefield accordingly private ownership arose. It is possible, however, that this principle may itself have its drawbacks. Natural instinct conducted primitive man to a system of common property. When he woke to his own powers this was thrown aside; he separated his own interests from those of his fellows, and the system of modern property is the result. Whether here, too, a maturer use of reason will show

[1] *Early Law and Custom*, p. 253. See also the rest of the passage.

that Nature was right after all, and when or how we shall return to the old system we need not speculate. It is sufficient to point out that it is no small part of the province of Law to reconcile these conflicting principles of socialism and individualism.

We have, then, made our first step into that new condition of Law which we are examining. We have seen how the idea of separate property, and of Rights corresponding thereto, may reasonably be supposed to have had its origin. But we are still only on the threshold. We have established a property in movables indeed, but the question of immovables is still untouched. To this we must now turn our attention.

Before doing so, however, it may be remarked that the order I have adopted, that, viz., of attributing to private property in movables a more ancient origin than to that in land, has recently received confirmation in a striking and interesting manner. Private property in land when once established is of two kinds, allodial and feudal; the former denotes an absolute ownership free from all interference from others, except of course by way of servitude; the latter an ownership which is not absolute, but which depends, originally in fact and later in theory, upon certain relations existing between the owner and the person to whom he is indebted for his property. The words are properly applied to Rights in land among Teutonic races; but we may say that the Roman ownership too is allodial, and that this owes its origin to the previous institution of private property in movables. The point, then, to which we

have had our attention recently called is, that the feudal tenure was not originally applied to land, but that this also arose out of gifts of various movables, such as cattle and arms, which were made by the Chief to his followers.[1] In both cases we see the truth of the remark that "an ancient Law of Movable Property may deeply affect a Law of land."[2]

I shall now attempt to give a sketch of the probable origin of property in land among the Romans. It is of course almost entirely conjectural, and is meant rather to illustrate by a particular case the general results of recent enquiry than to give a correct account of what really took place. Of the initial and final stages, however, we can be certain, and there are sundry traces of the interval between them which will serve to guide our steps. We begin with different clans settling down upon a tract of country and cultivating it, so far as each clan is concerned, in common; and when they have united to form a nation we find the territory consisting of two parts; one of these is divided into parcels of land which are held by different families as private property; the other remains public in name, but the enjoyment is really confined to those patrician families who have in some way or other obtained possession of it. We thus have the *agri privati* and the *ager publicus*. Now we can trace the foundation of Rome with some certainty to the union of three tribes; let us then go back a step beyond this event and consider the constitution of one of these tribes

[1] *Early Law and Custom*, p. 346. [2] *Ibid.*

separately. In regard to this we must make one of two suppositions. The separate clans of which it was composed were united either artificially by agreement or treaty, or naturally by ties of blood. The latter case is certainly far the most probable, and we shall assume its reality. In this case it will not be unreasonable further to suppose that it was the tribe, as thus composed of a union of related clans, which migrated into Italy and settled in Latium. The process is similar to that described in *Early Institutions*, p. 71, where the Vellalee, entering as one body into a district of Southern India, and possessing themselves of the territory, afterwards separated into their different clans and founded a number of Village Communities. The chief distinction is one which I have pointed out before, and consists in the different extent of country at the command of each clan. In India this was very considerable, and each of them might settle where it liked and have a waste or public territory of indefinite extent. In Italy this could hardly have been the case. It is not improbable that here an allotment of the district would take place among the different clans. I have so far discarded the legendary notion that the Romans were originally a band of outcasts, and have treated them as a regular Aryan tribe, sprung, or pretending to have sprung, from a common ancestor, developing in the regular way into different clans or houses, and maintaining this division in their migrations from other lands. But though we may perhaps regard this as a plausible conjecture for the Latin peoples generally,

yet the recent observations of Sir Alfred Lyall allow us to assign an origin to Rome more in accordance with Roman tradition. I refer to his account of the gradual formation of a new tribe formed of refugees and outcasts from others of established respectability, and of the reproduction in these of clans or families corresponding to the pure clans which have been left behind elsewhere. It will be enough simply to refer to his account of the rise of the Meenas in Central India,[1] and to Sir Henry Maine's summary of the materials thus brought to light.[2] We are thus able to see the probable meaning of the Roman traditions as to the origin of the city, and to realise how it came to contain all the distinctions of family or house which are proper to an ordinary tribe. The succeeding events may be assumed to be the same, whether these traditions are correct or not, and that I may not have to bear the burden of all the conjectures I am making, it may be some assistance to us if I quote the following passage from Mommsen:—

> The Roman territory was divided in the earliest times into a number of clan-districts, which were subsequently employed in the formation of the earliest "rural wards" (*tribus rusticæ*). Tradition informs us as to the *tribus Claudiana*, that it originated from the settlement of the Claudian clansmen on the Anio; and that the other districts of the earliest division originated in a similar manner is indicated quite as certainly by their names. These names are not, like those of the districts added at a later period, derived from the localities, but are formed, without exception, from the names of clans; and the clans who thus

[1] *Asiatic Studies*, p. 162. [2] *Early Law and Custom*, p. 273.

gave their names to the wards of the original Roman territory, are, so far as they have not become entirely extinct . . . the very oldest patrician families of Rome; the Aemilii, Cornelii, Fabii, Horatii, Menenii, Papirii, Romilii, Sergii, Veturii. It is worthy of remark that not one of these clans can be shown to have taken up its settlement in Rome only at a later epoch.[1]

The word tribe is of course here used in a different sense to the one we are at present ascribing to it. If, then, we regard the tribe territory as thus divided among the clans, we shall have at this stage *agri privati*, in the sense at least that they belong to the *clans* in separate ownership, and an *ager publicus*, the common undivided land of the tribe. That there should be such land is natural, for the territory of the tribe was never quite fixed. Wars would probably be undertaken by the entire tribe, and land thus conquered would be added to its public domain. Moreover, as an individual could be received into a family by adoption, so it seems a foreign clan could be received into the tribe. An allotment from the *ager publicus* would then be made to it. Such a case seems to have happened at any rate at a later time, when the Sabine Appius Claudius, with his clansmen and clients, was allowed to settle at Rome. I shall assume then that the *ager publicus*, as thus described, was identical with that of a later date. Let us next turn our attention to the course of events inside the clan. Here, I think, we must suppose that the division of the clan into a number of co-ordinate families has already taken place, for we have no trace in Roman history of a time when such is not the case. The

[1] *History of Rome*, i. 37.

position of the chieftain cannot be fixed with precision, but probably he had no extensive power, and matters were in the hands of the heads of families. We have further to consider that after the reception of the allotment of land by the clan, an assignment was made at some time or other of a small homestead to each family. The existence of this homestead is indeed an original fact in Roman history. About it there is no doubt; the only question is whether any land beside this was held as separate property. This homestead consisted of two *jugera* (about an acre and a quarter), and was obviously meant to afford a site for a house, with such garden ground as convenience might require. The assignment of such plots is placed by tradition at the very beginning of Roman history, and is ascribed to Romulus.

> Two acres a piece were said to have been first of all assigned by Romulus to each man, and these, as following the heir, were called *heredium*.[1]

Upon this matter, M. de Laveleye remarks:—

> The heredium, like the lot assigned to the Spartans, was regarded as inalienable, because it was the necessary home of the family, and even to the last days of the Republic it was a disgrace to sell it.[2]

After this allotment had been made, there was still left the greater part of the clan land. From this it obtained its agricultural produce, and doubtless some system of common tillage at first prevailed. What form this took, whether there was an actual division of the produce, or whether there was a redivision of

[1] Varro, quoted in *Primitive Property*, p. 164, note 1. [2] *Ibid.*

plots from time to time, it is now impossible to say. It would be interesting, too, to know whether the idea of possession arose in occupation of the tribal common land, or in occupation of that belonging to the clan. At any rate, if such occupation of the latter took place, either subject to regular change by redivision, or to occasional change when new families had to be provided for, this would correspond with sufficient exactness to the later idea of possession. The ancient possession would be an actual occupation with an intention to retain so long as was permitted by the clan; the modern possession is an actual occupation with an intention to be owner, though no such title has been directly recognised by the State. We could thus account for the tradition which Cicero records of the state of society in the first days of Rome, a period which is always expressed by reference to the reign of Romulus. "At that time men's wealth consisted in cattle and the occupation of ground"[1] (*locorum possessionibusque*). Further on we have another record which may give us a hint that will be useful. "Numa first divided among the citizens man by man the lands which Romulus had taken in war." Remembering that we have concluded from other sources that the idea of separate property first arose in war, though it was then confined to movables, we may find some reason in this tradition for supposing that similar circumstances first produced separate property in land. While the members of the clan were holding land on only a temporary tenure, there came

[1] *Cic. de Repub.*, ii. 9-14.

the accession of territory owing to the early conquests of the tribe. We are supposing that all this goes on before the union of the tribes and the founding of Rome. Probably an opinion has already been growing that it would be well to hold farms as private property, and the fact that these new lands have been taken in war makes it not unnatural to put this opinion in practice; for there is here an obvious resemblance to the case in which private property in movables has long been recognised. A certain plausibility is lent to this view by the etymological connection which some see between the word for farm, *prædium*, and the word for booty, *præda* (*præ-hida* from *præ-hendere*, *prendere*).[1] The effect of such a proceeding upon the lands held by the clans could not fail to be considerable. The clan not only has before its eyes a system of private property in land, but in this fresh assignment it has got rid of a large number of families whom it had accommodated with difficulty on its own estate. There is nothing, then, to prevent the elders, or other governing body of the clan, from making that division which convenience has long dictated; the clan lands are divided, and the system of private ownership of land is fully established. The *ager publicus* of the tribe, indeed, still exists, and several reasons forbid such a mode of dealing with it; but the above sketch may possibly represent to some extent the manner in which the *agri privati* arose. That there was originally common land belonging to the clan seems clear, and equally so that this disappeared at an early date. It is known,

[1] Ihering, *Der Geist des Römischen Rechts*, i. 112, n. 15.

too, that allotments of land of about seven *jugera* in extent were from time to time made to the plebeians, and it seems probable that the patricians would have instituted private property in land for themselves, before this was conceded to their inferiors. Whatever value, however, may be attached to the above sketch, we have before us the materials with which we really want to deal. Private property has been extended from those movables to which it was at first confined, and now exists over land also. The original title by which it was held, that of conquest, has, indeed, not been lost sight of, but another principle has come into play. Whether the land has been taken in war and is apportioned by the tribe, or whether it belonged to the clan and has been allotted by the clansmen, in each case the individual no longer ascribes his Right entirely to himself. This element, indeed, is not wanting. The land belonged to the whole clan collectively before, and now that the individual has his separate share, he only has what belonged to him. But this division is founded upon the general consent of all. The owner may seem to himself to have as independent a title now, as ever he had before, to the slaves and cattle he captured from an enemy; but it is really not so. In course of time, this community, made up of individuals who only carry their mutual independence one step further by making a division of the land, will grow into a State. The State will come to be something which men will conceive of as apart from and superior to its subjects; and whatever Rights men possess will more and more

come to be looked upon as Rights allotted by the State, in the same way as was allotted in ancient times, the common land of the clan. We may see here the germ out of which the idea of legal Right as opposed to mere individual claims will subsequently arise. So far I have attempted to sketch the probable manner in which Rights of ownership over things movable and immovable took their rise. The original title to things movable was capture in war; to things immovable allotment by the clan. It is needless to say anything about the title which to later ages seems most natural, title by occupation. It is shown with much clearness in *Ancient Law*, p. 250, that this idea arises in a later age, when the original difficulty of regarding things as private property has been got over; a tendency then sets in to provide everything with an owner as soon as possible, and the Right is accordingly conferred by the lawyers upon the first occupant.

But having thus examined the original investitive titles, we cannot proceed without making some slight enquiry as to those which were transvestitive. As soon as the community of interests has been broken up, and the wants of the individuals are no longer satisfied in the simple way that originally prevailed, and which resembled modern domestic life more than anything else we can compare it to, men discover that a means must be found for recovering the advantages which they have thus lost. Social life consists in exchanges of all kinds, intellectual, moral, and physical, between individuals, and the gaps that spring up when separate property is established must be

bridged over in some way. The elementary form of this seems, as I have already remarked, to be copied from the original title by capture. The way of acquiring property is to seize it with the hand. The elements of the *mancipatio* were in existence then, when by an understood arrangement one party seized his neighbour's ox, and the neighbour in return seized a slave. This was, of course, a matter of friendly settlement, but it was already felt that a transaction which altered the position of the parties needed some external ceremony. There was already the conception of a title to ownership, a title which consisted in capture, and hence this idea was naturally introduced into the first attempt at barter.

We may next glance briefly at the origin of contracts. It is pointed out in *Ancient Law* that the old idea that contract filled a large place in the life of primitive races is wrong. The actions of men are determined not by agreements with their fellow-men, but by the station into which they find themselves born. Indeed, if we consider the circumstances of primitive times, we shall see that few of the occasions which in modern times give rise to contract then existed. The family was sufficient in itself to supply most of its own wants, and the children and the slaves were at once agents and servants. Savigny has said that the object of property (*vermögen, i.e.* capability), including thereunder both property in our sense of the word and whatever is due by contract, is to extend the influence of the individual over the external world; over physical things by ownership; over other persons

by contract. But in the ancient world the influence of the *paterfamilias* is almost limited to his property and his family. The first exception to this would seem to arise when he finds that his property is insufficient for his maintenance. He is now driven to consider what to do. He is already acquainted with the practice of purchase, and in his extremity he attempts an imitation of it, which for the moment relieves his necessities, but leaves him in a burdened condition. The practice of borrowing we may surmise to have been nearly as old as the practice of bartering, and hence to have existed long before the introduction of money. For our purpose, however, we may consider it in its later form, and then it almost invariably consists in a loan of money. All the forms of an ordinary sale are gone through, but there is no transfer on the side of the borrower. The transaction is therefore incomplete, and the party who is in default remains under an obligation till he completes it by repayment. Thus far I have followed the order laid down by Sir Henry Maine, and it is with some hesitation that I now proceed to examine certain points in which I do not see my way to accepting his conclusions.[1]

The difficulty that meets us is to discover why the old word for obligation, *nexum*, which seems to denote only a later form which the mancipation took, should yet come to be used as the most general term, and should be defined to include "*omne quod per libram et aes geritur.*"[2] The explanation given by Sir Henry Maine is, that the original ceremony of

[1] *Ancient Law*, p. 320. [2] *Ibid.*

purchase was regarded as imposing a bond on the parties while it lasted, and that this bond was brought into greater prominence in a loan, inasmuch as it then continued as to one of the parties, who, so long as the loan was not repaid, remained *nexus*. When, then, in the progress of legal ideas it was seen that the sale and the contract were really distinct, and words had to be discovered to mark this distinction, the old word *nexum* was used in the case to which it seemed most applicable, and a new word, *mancipatio*, was introduced to denote the sale or conveyance. I wish that I could accept this explanation as perfectly satisfactory. There seems, however, to be so little in the original form of sale to suggest that either party is in any way bound, that I cannot believe that that idea would be chosen to give a name to it. Perhaps we may find another solution in the original paucity of language and the difficulty of forming abstract terms.

Physical objects acquire names long before men require to speak of events or abstractions, and we may well suppose that this primitive ceremony of sale went on for a long time before a name was wanted for it at all. The thing which I have originally taken from the enemy is *mancipium*; and so the thing which I have acquired by purchase is *mancipium*, in the same way *taken by my hand*. The ceremony is soon over, and I have no further occasion to think or speak of it. But when a sum of money is borrowed it is otherwise. The lender no longer sees a *mancipium* before him as the result of the transaction. He knows, indeed, that he is poorer than he was by a

sum of money, and that the borrower is bound (*nexus*) to him to repay it. Hence the transaction is not yet over. There may frequently arise the necessity of speaking about it, and it is quite possible that this form of the transaction, which is really only a development of the first, is the one which requires a name earliest. No attempt is yet made to distinguish, as is done later on, between the thing and the event. Hence the same word which describes the debtor describes the ceremony by which he incurs his debt; it is a *nexum*. When at a later time it was found necessary to distinguish between the contract and the sale, the use of abstract words had become more familiar. Out of the word *mancipium* it was easy to form *mancipatio;* hence the most ancient ceremony is continued under this name, and the original word *nexum* is retained as a general term. In course of time this antique form of contract falls into disuse, and when others are invented, the whole series of events which they involve are denoted by the abstract word *obligatio*. This solution of the difficulty is little more than conjecture, but it seems to me to possess some probability, and renders it unnecessary to derive a name from a part of the ceremony which is hardly likely in the first instance to be very prominently realised.

It only remains to consider in what light the Right, resulting from a contract concluded by means of the *nexum*, was regarded. At first we can hardly suppose that the notion of Right, as we understand it, would arise in this connection at all. The idea of a Right *in personam*, a Right arising from contract,

does not develop itself till the number of acts that can in this manner be claimed from others becomes numerous. The original *jus in personam* is intimately connected with the right of property, the *jus in rem*, and it would be foreign to all analogy to suppose that a distinction between them was readily perceived. With regard, at any rate, to the formality in each case, I have pointed out, following Sir Henry Maine, that no distinction was observed, and the early Roman can hardly be credited with a distinction in ideas where he left the outward form untouched. This contract, indeed, only differed from a sale in that the right of property on one side was deferred. It created, if we may so speak, a future *jus in rem*. This idea, perhaps, may be carried further. The future *jus in rem* does not depend entirely on the action of another person. The lender need not wait for the borrower to repay before it arises. That would be to introduce the modern idea of a *jus ad rem*. The primitive course is much simpler. The debtor will repay the loan if he can, but if not, the *jus in rem* which is to belong to the creditor merely, in Austin's phraseology, changes its subject. Instead of the money repaid by the debtor, the person of the debtor himself is now the *res* over which the Right arises. In other words, upon the failure of the debtor to pay his debt, the creditor immediately proceeds to possess himself of the body of his debtor. It has been remarked that the tendency in early times is to regard the debtor as a thief. He has indeed broken that mutual good faith which ought to subsist between

members of the same tribe. It is, therefore, now proper to deal with him as a stranger, and the same feeling which prompts the victor to make a slave of the vanquished, prompts the aggrieved creditor to make a slave of his debtor. The Right resulting from the contract, therefore, so far as it is regarded as a Right, cannot be distinguished from a Right of property. The same Right which the creditor has over the money he is lending he will have over the money which is returned, and should the money not be returned, the same Right he will have over the person of his debtor. The enforcement, indeed, of this latter Right, is not, as we shall presently see, attended with the same violence as the original capture of an enemy; for a Right of property when once established is absolved from the necessity of repeating in later cases the early incidents of its origin. These remarks may, however, illustrate the manner in which such Rights arise.

It may not, moreover, be unreasonable to suggest that another system of contract was growing up at the same time in quite another fashion. The contract of loan was assigned to property law because of its intimate connection therewith. But it was not long before men discovered the necessity for making contracts with each other upon other matters than the borrowing of money. We may, perhaps, assign this to a very early date. Inside the clan we have seen that there was originally complete community of interests. No one could decide for himself what he should have and what he should do. All such matters were decided by custom. His position in the clan

decided, from his birth, both his portion of its wealth and his duties. There was no private property, and there was no contract.

Now for the origin of private property, we have looked outside the clan and discovered that it probably lay in the depredations committed by one tribe upon another. As, then, we find the origin of private property, which tends to separate men, in quarrels between tribes, so, perhaps, we may see in treaties between them, the origin of contracts, which bind men together.[1] Contracts inside the clan were unnecessary. Every man had his proper duties assigned to him by custom. This, and the authority of the chief over the clan and of the father over his family, were sufficient. Now it has been remarked that new ideas enter into men's minds with difficulty, and if we want to find their point of origin we must consider where the resistance to them was least. This, in the case we are supposing, was in the relations between clan and clan. It is a fact that may be observed, even at the present time, that contract with difficulty makes its way where men's relations have hitherto been ruled by *status*. It is clear, then, how great must have been the resistance to the original introduction of contract between members of the same clan. But between clan and clan, not only was there no such resistance to its introduction, but a positive necessity for it was soon felt. Bonds of some kind must exist, and nothing but contract can form them. If, again, we consider the evidence afforded

[1] It will be seen that this is very similar to Sir Henry Maine's suggestion as to the origin of *price*.—*Village Communities*, Lect. vi.

by words, this view will be much strengthened. Side by side with the word *nexum* we have the word *sponsio*. The *nexum* referred specially to property, and if it included certain contracts, these were only such as at first could not be distinguished from property. But when men's attention was called away from property and fixed upon contract proper, *i.e.* upon promises entered into by stipulating parties, they spoke not of a *nexum* but of a *sponsio*. That this was the generic word for all contracts we learn from Paul, D. 50, 16, 7: "'*Sponsio*' *appellatur non solum quæ per sponsus interrogationem fit, sed omnis stipulatio promissioque.*" It is impossible, too, to avoid passing from this assertion to the well-known Greek meaning of the word. Treaties between different peoples were concluded with a religious ceremony, that of pouring out libations to the gods. Hence a treaty was called σπονδαί. If, then, we accept this as a confirmation of the view laid down above, we can place our original contract in the treaty between tribe and tribe, and then obtain its subsequent stages. It is true, indeed, that when contract at a later period has been developed, and has been taken under the protection of the State, this is the very sphere from which its operation is excluded. This is recognised by Gaius (iii. 94), who expressly asserts that there can be no contract between nations, "because, if any violation of it occurs, redress is obtained not by legal process but the right of war." This error, however, arises from importing into those early times conceptions of a later date. It is recognised, of course, that there is no power to

enforce the treaty, and hence it is placed under Divine Sanction. The original contract, then, exists outside the domain of Law. It is a promise, accompanied by a religious ceremony. Any violation of it, therefore, is a thing which may draw down the wrath of the gods upon the whole people. Thus when an individual has violated it, that the people may not share in his guilt, he must be given up to the enemy. This is, indeed, similar to the later *noxæ deditio*. It must be observed that in international matters there is a curious renewal of the old paternal authority, and this fact shows clearly, how the idea of any such power being inherent in the king had vanished from the Roman mind. When a treaty had to be concluded it was done by a *pater patratus* chosen for the purpose, and he acted in the name of the Roman people.[1] Hence the surrender of the culprit was similar to the surrender by the father of a child or slave who had done some damage. The same took place also when a general had concluded a treaty which was not ratified by the people. In this case it is expressly said that the object was to free the people from the consequence of violating a religious tie: "*Ut populus religione solvatur.*"[2] So, again, the Roman people themselves could not declare war, and thus violate a treaty, without the express sanction of the gods.[3] From all this we may infer that the original contract was a treaty entered into between different tribes, and supported by Divine Sanction; and further, that when individuals violated it, they

[1] Livy, i. 24. [2] *Ibid.* ix. 10. [3] *Ibid.* i. 32.

were delivered up to the enemy that the people might be safe; and when the tribe violated it, they took care first to have the approval of the gods.

When, then, that process to which I have so often alluded commenced, when the intimacy of the tribe began to be broken up, a similar necessity to that which had called for treaties between tribe and tribe, now called for similar arrangements between man and man. Nothing in such a case was more natural than to resort to the same procedure, and the original contract is an agreement ratified by an oath. If, now, the violation of an oath had been left to the slow retribution of divine justice, this might have been inconvenient for the management of human affairs. It was a peculiarity, however, of the Romans, that neither divine nor moral laws were left without suitable human sanction. The moral law was enforced by the censors; the divine law was enforced by the priests. Hence there arose an obvious mode of enforcing contracts, but to this I shall return when we come to consider the origin of the different actions at law.

We have thus seen how various Rights may be supposed to have arisen among the Romans, or rather how there arose those claims of one person over other persons or over things, with which, under the name of Rights, Law will at a later time concern itself. We shall now have to consider how these claims came to be protected and regulated, in other words, how they were turned into legal Rights, properly so called.

CHAPTER VIII.

THE PROTECTION OF PRIVATE RIGHTS.

ACCORDING to the views maintained by English jurists, Rights date from a time when a State creates them by laws and maintains them by force. According to the historical order which I am trying to present, Rights exist long before legislation has been dreamt of or a judge appointed. Ihering draws a striking comparison in this respect between the organisation of Justice, which is to us a matter of course, and the organisation of Work, which still only exists in the brains of dreamers.

> We have lived to see the time when a bold claim has been made upon the State for the "Organisation of Work;" but great as may be the confidence which to-day is placed in the idea of organisation by the State, yet we have hitherto shrunk from pushing it to so extreme a consequence, and the answer has been returned: "Work organises itself; the State neither can nor ought to meddle with it." How then, if there was once a time when Justice organised itself without the help of the State, when the State was accustomed to give so little help to individuals, that they were left to find Justice as to-day they find Work.[1]

Strange as this may seem at first sight, its truth becomes evident on a little consideration. In his *Political Justice* (ii. 103), Godwin says: "Man is a

[1] *Der Geist des Römischen Rechts*, i. 119.

species of being whose excellence depends upon his individuality; and who can neither be great nor wise but in proportion as he is independent." The idea of this remark, which was uttered as a protest against the intrusive and all-pervading power of government, may have been realised, though dimly, by the primitive Romans, and they may have shrunk from the early attempts to organise Justice as we shrink from the task of organising Work. Each involves the interference of Government in complex matters affecting intimately the welfare of the individual. No one in the present day affirms that Work organises itself in a perfectly satisfactory manner. The individual loss and suffering that are inflicted may not unreasonably be compared with the disorder that arises under a system of Self-help. The objections to attempting a change lie partly in the complexity of the subject, partly in the idea that only under the present system can the energies of the individual be evoked and universal idleness prevented, and partly again in the feeling that a government charged with such functions would not improbably exercise an intolerable tyranny. Similar motives may have retarded the rise of State Justice in Rome. The problem in itself was difficult and only to be solved gradually by long experience. The Rights in question were felt to depend upon the individual; their strength lay in the consciousness of their fairness, backed up by an intention to maintain them; and there was no immediate reason why the individual should resign a claim based upon his own conscience, and entrust it rather to the general con-

science of the people. If there was such a feeling, subsequent events have showed that it was not altogether unjustified. The above parallel, though it may seem fanciful, may yet help us to realise the fact that Rights existed in Rome long before the legislator or the judge had appeared, and that these latter were only evolved slowly and gradually in the course of time. The writer quoted above has some ingenious remarks on the inherent badness of all Law, because it fetters men's actions, and of all judicial decisions, because they fail to take account of the special circumstances of the case; hence he argues for the abolition of law, and the decision of every fresh case on its merits. As I shall show later on, the complexity of human affairs makes this impossible, because Law must become in course of time a technical matter. But although this is a good reason for not abolishing State Justice at the present day, it is possible that some such considerations as the above stood in the way of its original establishment, and that the people only gradually assented to the institution of Courts of Justice. But, of course, in this instance the various objections have been got over. The complexity of affairs was conquered by the unremitting toil of generations of Jurists, and the records and fame of the Roman Law are their enduring monument. The disorder consequent upon the system of Self-help has disappeared, and the security thereby obtained has compensated for the additional power given to governments. Whatever advantage there was in the individual being himself conscious of his Right and resolved

to maintain it, ought to be perpetuated in the fact that such Rights depend now upon the natural conscience, or at least that they do so whenever Law and Justice, as I have defined them above, happen to coincide.

We will proceed then to enquire what are the conditions under which Rights exist in this early state of society before the help of the State has been called in and Justice has been organised. We have seen that Rights have their origin in violence outside the clan, but are nourished on the peace that prevails within it. They owe their origin to the strength or prowess of the individual, and may be said to arise by his own will, but it is essential also that their fairness should commend them to the assent of the community. There is, therefore, at present no difference between the will of the individual and the will of all, and Law and Sanction are alike unnecessary. We have to notice, in particular, that the Right is perfectly clear, that it is enforced by public opinion merely, and that it is established by the individual himself. But we cannot go far without discovering that each of these matters requires special attention. In course of time, as interests multiply, the Rights are no longer perfectly clear to the unaided observer, nor can they be clear to any one without careful examination and study. Hence arises the science of Jurisprudence, whose business it is to keep watch over these Rights; to have them so marked out and defined that they can be at any time known. In course of time, again, as the clan grows into the tribe, and the tribe into the nation, the force of public opinion is no longer able to enforce these Rights,

and we must have some central power which shall act with a force and precision that public opinion lacks; hence arises the necessity for a State Sanction. Finally, it becomes impossible for each individual to be himself the author of his own Rights. The advantages which form the subject-matter of Rights no longer belong entirely to one person, but must be duly apportioned between many. Thus a creation of Rights, or a fundamental change in them, must at times be effected by a central decree. Hence the necessity for a legislative power which shall make, as times alter, suitable changes in the distribution of Rights.

Inasmuch, then, as in those early times the individual relied for protection upon the fairness of his claim and the sympathy of the rest of the community, it seemed to be realised very quickly that for this system to work at all the claims must be perfectly certain. To this idea we may ascribe the introduction of the witnesses who play so prominent a part in early legal ceremonies. It is, indeed, difficult to separate precisely the different objects which they served, for it cannot be doubted that it was their business not only to ascertain the existence of the Right, but also to help in enforcing it. The establishment and enforcement of Rights are, then, at first in the hands of the same persons, and these the friends of the claimant.

It is, however, impossible to understand how this system could work effectually without realising clearly the nature of the relations existing between the members of a *gens*, and this, in its turn, is intimately connected with that direct enforcement of rules set by

public opinion, which was so conspicuous a feature in early Roman society.

Such an enforcement is, indeed, quite removed from the ideas of the present day, because we are so much further removed than the early Romans from the influence of the family principle. We have seen the family growing into a clan, and the clan into a tribe. At the same time that the family thus increases in size, the bonds of kinship which bind its members together come to have less and less weight, and this process goes on very rapidly when the tribe has settled down upon the land. The early Romans, however, never allowed the ties which bound together the members of the same clan quite to pass away; indeed the *gens*, like the family, formed an important factor in Roman life. We do not exactly know how the *gens* governed itself, for although we hear of a *princeps gentis* he seems to have no *patria potestas* over the other members. Probably the *gens*, like the Roman State itself, was managed on democratic principles, and the heads of the families were co-ordinate one with another in power. Standing between the family and the State it shared in the nature of each. The bond which kept the members together was relationship, as in the family: the principle upon which they managed their affairs was that of free consent, as in the State. Thus the *gens* may be described as "a family with a political character, and as a political union with a family character."[1] It was this fact that prevented the original freedom

[1] Ihering, *Der Geist des Römischen Rechts*, i. 184.

of the Roman from degenerating into licentiousness, and made it compatible with the existence of society. But though the constitution of the *gens* imposed restraints on its members, these were not left without adequate compensation. The individual obtained all the assistance that was necessary for his existence in a primitive and rude state of society. The *gens* took up his quarrels and avenged injuries done to him. The *gens* assisted him in bearing any special contribution that might be levied on him. If he died leaving his children unprotected, the duty of looking after them rested ultimately upon the *gens*. In this was involved the requirement that all its members should watch the conduct of the appointed guardian, and if necessary bring compulsion, legal or otherwise, to bear upon him. It seems to be due to this, indeed, that in later times, when the influence of the *gens* had decayed and many ideas originating there had been extended to society at large, it was permitted to any one to bring an action against a guardian although he himself had no interest in the matter. In other words, the "*actio tutoris suspecti*" was an "*actio popularis*." But while all these advantages accrued from union with a *gens*, the individual was subjected to restraints to which was due in a large measure the long continuance of the position and virtues of the patrician families. Thus it was early realised that the aristocracy, to maintain their power, must maintain also their wealth. It is pointed out in *Early Institutions*,[1] that among the ancient Irish wealth was

[1] P. 135.

a means of attaining to nobility. The Romans, on the other hand, resolved to retain nobility by retaining wealth. Hence the severity with which they looked upon the *prodigus*, the *paterfamilias* who was wasting his inheritance. This salutary principle, indeed, was adopted into the general practice of Roman law, and a guardian was appointed for the spendthrift just as though he were a lunatic. But the *gens* exercised an oversight not only over property, but over the conduct of its members generally, and in this manner the absolute power which a father had over his dependants was restrained from tyrannical exercise. Thus the Roman, fully recognising as he did the principle of individual liberty, saw nevertheless that the right to it was only co-extensive with the ability to use it properly, and hence the vicious and dissolute found themselves hedged in by restrictions on all sides.

The practical instinct of the Romans had from the beginning recognised that freedom to be a power must submit to limitations, and the wild spirit from which sprang the principle of the subjective will, saw nothing objectionable when in practice it was subjected to limitations which even to our weak sense of individualism seem to bear insufferable marks of paternal government.[1]

At a later time, this general oversight was kept up in various ways. As the union of the *gentes* was relaxed, part of it fell under the sway of Religion, and part under that of Law. But we must note that its distinctive feature was maintained in the power of

[1] Ihering, *Der Geist des Römischen Rechts*, i. 195. It is from this work that the substance of the above remarks has been taken.

the censors. These officers were at first appointed to make up registers for purposes of taxation, but in course of time the power which they thus acquired made it easy to assume some at least of the old gentile authority, and thus was perpetuated for a time that tangible sway of public opinion which had been so powerful among the early Romans.

So far I have tried to show how Justice was substantially obtained without the assistance of State force. This depends upon the presumed absence of violence and fraud which is at first found within the clan, and it seems to be this fact which makes the establishment of Rights, if not possible, at least easy and permanent. Although so much stress has been laid on the necessity of Force as a constituent element in Law, yet it is possible that this is an incorrect view of the matter. Force, as Savigny says, is the physic of Law, not its proper sustenance, and it is very doubtful whether Law could ever have been reared and brought to maturity if its only food had been the physic which so many prescribe for it. We may at any rate be confident that such was not the case with the Roman Law. For its proper growth Law requires a sphere of peace, not of strife, and, in the normal state, its ultimate support is the approval of all, not the power of a Sovereign. Although then, as we have seen, Rights arose in violence between tribe and tribe, yet within the circle of the tribe itself they had a quiet haven where they might obtain some degree of strength and stability before the sure disease of all Law began to attack them, and the appropriate

remedies had to be devised. I have given reasons for thinking that the original foundation of the Right of property commended itself to the approval of the clansmen. Now Hooker remarks that "the most certain token of evident goodness is, if the general persuasion of all men do so account it."[1] In this case the token seems to have been present in the establishment of the Right of property. Herein, then, lay its original defence. The warrior who had captured the slave in war was doubtless prepared to defend his acquisition if necessary. But we can hardly doubt that at first this necessity did not arise. In no other way, I imagine, can we account for the early rise of that respect which the Romans paid to Law. The natural community of interests had commended itself to the untutored instinct of man. When this began to be broken up and separate interests arose in the shape of private property, these too commended themselves to the approval of all. They bore in themselves the mark of "evident goodness." While, then, they took their rise in the personal superiority of the individual, they were nourished on the common consent of the community.

But though it is a tenable opinion that Rights had their origin in this manner, we soon have to consider how more effectual means may be taken for their protection. We shall see immediately how the very nature of Rights gave rise to the occasional need for arbitration between contending parties, but it will be well for us to remember, too, that there was arising a power which, when necessary, could stand behind the

[1] *Ecclesiastical Polity*, i. 8, 3.

arbitrator and enforce his decision. This power was originally of two kinds, secular and religious, and it first makes its appearance in the punishment of crimes. It is a characteristic feature of the Romans, that in the very earliest times we already have the distinction between *jus* and *fas*, between Law human and divine. Indeed, it seems as though men, the further they got to the West, were better able to realise this distinction, and its recognition seems to have taken place at an earlier time among the Romans than among the Greeks. In the Greek clan the position of the chief was maintained to a later date than among the Romans; he certainly had judicial powers of an extensive kind, and there seems to have been an impression that his decisions were directly inspired by the gods.[1]

But we have no trace of the time when the Romans had not made this distinction between divine and human Law, and it is curious that the manner in which they regarded human Law is reflected in the word they used for it. The derivation of *fas* is uncertain; it is either that which shines (equivalent to φάος, light), or that which is spoken. In either case it may be regarded as Law emanating directly from a Superior Being. But the first conception of *jus* is different. The idea here is that of *binding*. It would seem as though the early Romans, though they found themselves encircled by a host of customary observances, yet perceived that many of these were of a different nature to the laws they ascribed to the gods. To murder one of the same clan would be *nefas*, against

[1] *Ancient Law*, chap. i.

the divine commands. But the customary rule, in accordance with which each clansman carried on his tillage, in a manner observed by all, was simply *jus*, that is, something binding him. The divine law was *fas*, because the gods had so expressed their will; the human custom was *jus*, because nothing was known of it save that it was binding. To each of these great sources of Law there corresponded an appropriate Sanction, the one inflicted by the priests, the other by secular officers.

It is not unreasonable to suppose that a great increase in crimes of violence took place upon the union of the original Roman tribes. With regard to the early measures that were used to check this I need not say much here. It will be sufficient to refer to the last chapter of *Ancient Law*, where the subject is treated with much clearness. It is there remarked that the idea of crime, as affecting the whole people, and therefore liable to be punished by the State as representing the whole people, is one of slow growth. And, indeed, upon the view of the early Roman community that we are taking, this is natural, for there was no such thing as a State in existence. There were a number of co-ordinate independent families, and in some matters the administration was entrusted to a Council and a Chief, but that was all. Hence crimes were at first dealt with either as sins against the gods, to be punished by proper expiation, or as wrongs against the individual, to be punished by private revenge. But although there was no such organisation at Rome as corresponds to our modern

idea of a State, yet there was government of a kind, and this was powerfully influenced by the state of war in which the Romans continually lived. From the existence of insubordination in the army it was easy to pass to rebellion against the State, and this seems to have been one of the first crimes, if not actually the first, which was dealt with publicly. It was a matter, indeed, of self-defence. As the individual warded off assault, so the State warded off rebellion. Hence we may explain the very early mention of the crime of treason, *perduellio*, and of the two commissioners who acted as the King's deputies in such matters, the *duo viri perduellionis*. As this crime arose with the State, so the State naturally took charge of its punishment. The exact manner in which it invaded the spheres of priestly judgment on the one side and private revenge on the other is not exactly known. We find at an early date the *quæstores paricidii*, or "trackers of foul murder," and the criminal jurisdiction of the State courts made gradual progress. The system of private revenge did not, however, entirely lose its ground. In cases of aggravated guilt its justice was still recognised. The husband might slay the adulterer taken in the act; the owner might slay the thief who was caught stealing by night. So, too, the Law itself shows signs of having merely replaced private revenge. It is indeed, in its first stages, administered by persons to whom private revenge is well known, and to whom in extreme cases it still appears quite natural. It is not surprising, therefore, that it adjusts its punishments upon the same principle. Thus the

penalty is proportioned not to the guilt of the wrong-doer, but to the state of wrath in which the injured person would be at the moment of punishment, if this were in his own hands instead of in the power of the State. Hence the difference between the *fur manifestus* and the *fur nec manifestus*; the former may be slain, he is taken in the act; the latter need only pay double, the wrath of the injured person has had time to cool.

Nor, on the other hand, were the advantages of the priestly jurisdiction forfeited. Matters which had formerly been left to the priest alone now came under the cognisance of the State, but there was still abundant scope for divine penalties, and new sins were from time to time added to the list. Thus the Divine Law penetrated where the Human Law either could not or would not extend. The Romans saw the danger of the modern doctrine that the Sovereign is all-powerful, and where they feared that public opinion could not reach him they called religion to their aid. Thus it was a sin, *nefas*, for the Dictator to stay more than six months in office. So, too, the laws which protected the tribunes of the people were placed under divine protection. Into the family, again, the law refused to enter; not so religion.

If a husband sold his wife, or a father sold his married son; if a child struck the father, or a daughter-in-law her father-in-law; if a patron violated his engagement to keep faith with his guest or dependant, the civil law had no penalty for such outrages, but the burden of the curse of the gods lay thenceforth on the head of the offender.[1]

[1] Mommsen, i. 184.

We have thus come to the end of a digression which was intended to show how the union of the *gens* had, in the first place, a strong influence in the maintenance of Rights, and how a power was growing up both in secular and in priestly hands, which, when necessary, would be ready to come to their assistance. We may now return to the point from which we started, the establishment and maintenance of Rights by members of a *gens*.

The support that these were bound to give to the interested party was probably at first very effectual. Disorder and violation of Rights would exist chiefly between members of different *gentes*. Hence we find that relationship was no objection in witnesses. They must not, indeed, be women, in case force should become necessary. But the closer the relationship the more natural and hearty is the support they give to their kinsman. It is easy to understand how the duty of giving assistance would attach to the witnesses. It is simply an instance of the natural desire to "see a friend through" with a matter in which help has already been given to him. The establishment of a new Right is a matter of some importance to an early Roman; that there may be no mistake about it he calls in various friends as witnesses; and if, afterwards, he should have any difficulty in asserting his claims, it is to these same friends that he looks in the first instance to assist him. We must not indeed imagine that such a course would lead to general struggles between *gens* and *gens*. If there was no doubt about the claim his fellow-clansmen would shrink from supporting the

defendant, just as the claimant, on the other hand, would receive from his friends sympathy or actual help. It may not be improper to assume that the long acquiescence in customary law had developed in the Romans a natural respect for order, and this would prevent a whole *gens* from supporting an unjust demand or resisting a fair one. This then is the first step to the organisation of Justice. The two requisites in the maintenance of all Rights are, that the Right should be known, and that there should be power to enforce it. The first requisite is supplied by the presence of the witnesses; the second by the readiness of the witnesses to lend their actual assistance. This assistance, however, is radically different from State-help. It is not independent and certain like this, but still depends largely upon the support of public opinion. It is this support, however, which prevents the collapse of the whole system amid bloodshed and anarchy.

In this condition of things we must search for the beginning of a more formal system of Justice. Such an attempt is full of interest, and owing to the researches of recent Jurists may be entered upon with some hope of success. I have already tried to show how Rights were originally established, and we are acquainted with the most ancient procedure by which they were enforced. From these sources of information I shall try to deduce the origin and development of State Justice. It has been remarked that at the present time Jurists are concerned more with Substantive than with Adjective Law; in other words,

the Rights themselves are deemed of more importance and worthy of more careful investigation than the procedure by which they are enforced. In the early stages of Law, however, the contrary is the case. The Action (*Actio Legis*) is strictly defined, and is made the pivot upon which the whole Law rests. From a knowledge of the Actions they can bring, men may discover what are the Rights they possess. This idea, indeed, lasts for a long time, and appears with almost unabated vigour in so mature a system of Law as that contained in the Digest. The Title which is there devoted to the action for reclaiming property (vi. 1, *Rei Vindicatio*) contains very little that has to do with the action itself, but the compilers thought that this was the proper place to introduce a multitude of rules which should have found their place in a Title on Ownership. In the same way many of the most important Rights of property are credited with no independent existence at all, but have to be searched for in the Book on Interdicts.

But this defect, according to the view I am here suggesting, is not present in the very infancy of Law. The taint is not original, but is acquired through contact with the corrupting influences of real life. Men's thoughts were first fixed upon their individual privileges or Rights, and it was to protect these that Civil Procedure was gradually developed. But in course of time the entrusting of justice to government brought a great evil with it. The practice of government no longer depended on the existence of Rights; Rights were dethroned from their proper eminence and made

to be dependent on the practice of government. We must therefore go back beyond this unhappy state of Law, the perpetuation of which has so often made justice an object of ridicule. Instead of beginning with the Actions of Law and discovering Rights from them, we must commence with Rights and see how each came to be enforced by its appropriate action. We need not, however, go back to those very remote times when all Rights arose by capture in war. We are now at a later stage. Land has become the subject of separate property. Its produce is taken for his own sole use by the owner. This and all other things pass from hand to hand. The practice of borrowing has also begun, and men have need of each other's services. The matter, then, upon which disputes can arise are matters of ownership, matters of debt, and matters of obligation. I separate debt from obligation, for reasons which are sufficiently apparent from the sketch of their origin given above. Now disputes as to ownership may be expected to arise when the thing in question has changed hands by theft or other fraudulent means, by conveyance *inter vivos*, or by devolution upon death. The first case is rather outside our present subject. It constitutes a direct violation of an existing Right of property, and is regarded by the owner as a matter calling not so much for self-help as for revenge. The extraordinary respect attached to property by the Romans is partly explained by the prominence which its possession gave to the individual. The foundation of private property was the commencement of individual importance.

Hence wealth was bound up with the person of the owner, and a violation of the Right of property was a serious offence. The thief taken by night might be put to death; and in all cases the thief taken in the act was awarded to the injured party as his slave. But this does not immediately lead to an action. According to the principle above laid down, the culprit was abandoned by the members of his own *gens* and execution proceeded against him as a matter of course. This process, then, though it gave rise to the later *actio furti*, was not thought worthy of founding an action in the older system. For this we must rather look to those cases where a real doubt as to the Rights in question could arise. Sir Henry Maine has explained very clearly the symbolic meaning of the *Actio Legis Sacramento*,[1] and it is perhaps not inconsistent with his views to regard it as the enforcement by the State in a particular case of that which was already done by all reasonable men in other cases; private arbitration, that is, was the precursor of organised Justice. The first business of the State was merely to compel contending parties to refer the matter to arbitration; it was only at a later date that it took the whole affair into its own hands, itself appointed the arbitrator, and laid down the law. This view, perhaps, derives its plausibility from the supposition that disputes as to property must already have become common while the bonds of kinship forbade an actual fight between the rival claimants. In opposition to this the well-known practice of wager of

[1] *Ancient Law*, p. 376.

battle among the Teutonic tribes may be urged, but the different social habits and character of the Romans make it quite unnecessary to suppose them to have ever had recourse to such a proceeding. It may well be doubted whether the Romans ever loved fighting for its own sake. I have already referred to Mommsen's conjecture that the founding of Rome was due to commercial considerations. The character of the Romans was, indeed, a strange mixture of different elements; notwithstanding their strong sense of individuality and love of personal freedom, they were influenced no less by an intense love of the commonwealth and a desire to procure its prosperity. Their first struggles were due to no warlike spirit, but were entered into to preserve the existence of the city. The success which ultimately crowned their arms may have left a warlike stamp upon their character, but in after ages this seems to have been but a means to an end. We can thus see that there was a fundamental distinction between the early Romans and the Teutonic tribes. It is not justifiable to transfer to them the warlike practices of the latter, so far as they led to combats between members of the same tribe. The Roman was ready enough to sacrifice himself for the common good; but when war was over his business lay with his farm, not with fighting his neighbours. The development of the tournament as a pastime in the North seems to favour the same view. There was nothing corresponding to this among the Romans, and the gladiatorial games of a later age rather ministered to a passion for excitement and a lust of cruelty than

testified to a native love of battle. These considerations account for the fact that we have no trace of such an institution as wager of battle existing among the Romans, and we may well assume that decision by arbitration was with them the beginning of judicial investigation. It would, moreover, be unfair to charge against them the reasons which, according to Hallam, led to the continuance of the opposite system in England, viz. "systematic perjury in witnesses, and want of legal discrimination in judges."[1]

In course of time, indeed, as has been frequently remarked, the feeling against actual fighting for property died away, and it was this that finally compelled the intervention of the State, an intervention which was perpetuated in the manner sketched by Sir Henry Maine. But it must be remembered that, so far as we know, the Prætor never himself decided the matter. All that he did was to compel the contending parties to refer the matter to arbitration. This, then, would seem to have been the original practice, and the Prætor merely made it compulsory in every case.

We have mentioned above two cases as affording occasion for disputes as to property, when there has been a conveyance *inter vivos*, and when there has been a devolution by death. Each of them is useful for illustrating our subject. If there has been a *mancipation* simply, and the new owner loses possession, there is no difficulty. He goes with his witnesses to the land, if it is land, or to the place where the thing is, if it is a movable. The other party has

[1] *Middle Ages*, i. 282.

no witnesses, and no pretence of title. A restoration takes place as a matter of course, and the affair leaves no trace on the Law. But suppose that in some way there has been a mancipation of the same thing to two different parties. In this case, when the one goes with his witnesses to claim possession, he is confronted by the other with his witnesses to resist the claim. In isolated cases this will lead to a quarrel; but, as a rule, the respect of the Roman for order and property will lead to a reference to arbitration. The decision of the arbitrator is accepted as final, and the vanquished party yields. The other case which I have mentioned is of a slightly different character. Upon the rise of separate property, and before the notion of a will had been introduced, numerous questions must have arisen as to the division of property upon the death of the *paterfamilias*. An interesting case of this kind is cited in the records of Jewish Law.[1] Soon after the settlement of the Jews in Canaan, after the assignment of the land to the various tribes, and then to the various families in the tribes, an owner of land died leaving two daughters. The question at once arose whether a devolution of land upon females should be allowed. The matter was naturally referred to the decision of the elders of the tribe, and they pronounced what is called a "statute of judgment" in favour of the daughters. Soon after it was perceived that a difficulty would arise if the daughters married out of the tribe, for then the land would pass out of the tribe too.[2] Accordingly, the court sat again

[1] Numbers xxvii. 1-8. [2] Numbers xxxvi.

and affirmed its former judgment in general, but added a proviso that the daughters should be married to husbands from the same tribe. Leaving for the present the question of who would be selected as judges in such a case at Rome, we have in the two instances that have been given instructive examples of how rules of law may be supposed to have arisen. The first case raises the very common question of which of two innocent purchasers is to have the preference, and we already see the germ of the famous maxim, "*qui potior est in tempore, potior est in jure.*" The second is more akin to direct legislation, and we see how even this starts originally from the same source as most of our English Law, viz. a decision upon an actual case.

The reference to an arbitrator, which has been described above, was perhaps the earliest form of the *Actio Legis Sacramento.* Its further development I shall consider later on. For the present it is sufficient to have seen how the actual existence of the Right of property led to the invention of some means for its maintenance.

It has been shown how debts were incurred by means of the *mancipatio*, and how from that fact the term *nexum*, which ultimately acquired a general signification, was derived. We must consider, then, what means were adopted in case the debtor failed to fulfil his obligation. As I have shown above, the remedy was really just the same as in an ordinary mancipation, viz. a proceeding *in rem*, the *res* here being the person of the debtor which was held to be forfeited; but the whole matter was much more striking than the

mere taking possession of property, and it consequently acquired a position of its own; hence the *Manus Injectio*. At first such cases would rarely give rise to doubt. The *nexum* was entered into in the most formal manner, the witnesses could at any time be produced, and the debtor was left without the slightest defence. The *Manus Injectio* followed as a matter of course, and to such an extent was the debtor presumed to be guilty, that even in later times when justice was organised, he was not himself allowed to set up a defence. Another might be his vindex and plead in his behalf; but even this privilege was hemmed in with restrictions, and the *vindex* who failed, himself shared the debtor's guilt, and had to pay a penalty. It has been said that the fact that the Romans submitted to the harsh punishment of debtors, is a striking instance of the sanctity which they ascribed to property. Perhaps, however, we may see in it rather a proof of the power possessed by the rich over the poor. I have already pointed to the gentile organisation of the patricians, and the manner in which this was employed for keeping wealth in their families. A patrician, therefore, would rarely be insolvent; and if this did happen, it would be the duty of the members of his *gens* to come to his assistance. The severity of the procedure must have fallen, as we know from history it did fall, on the plebeians; and it was rather a mark of patrician wealth and power than of general reverence for property.

Some difficulty has been caused by the fact that Gaius describes this process as a *Legis Actio*, while, so

far as we have at present traced it, it is merely a form of Self-help without any reference at all to an action at law. The point is noticed in *Early Institutions*,[1] and is there explained by a consideration of the original meaning of the term. In the phrase *Legis Actio* the word Actio has not yet acquired its modern meaning as a process carried out under the supervision of a judge, but has the more general meaning of setting the law in any way in motion. Hence the *Manus Injectio*, like distress of all kinds, may be described by this term. The explanation given by Ihering is somewhat different.[2] At the beginning the *Manus Injectio* was such as I have described it. But in course of time, as debts multiplied and became less certain, it was necessary to bring this, like other such matters, under State control. Hence arose the necessity for the creditor to take the debtor before the Prætor before carrying him off to his own house. Now, too, it was possible for a question as to the legality of the arrest to be raised by means of a *vindex*. In this case a regular action at law followed, and the Prætor appointed a *judex* before whom it was taken. Thus the old *Manus Injectio*, which was merely a summary execution, could in certain cases lead to an action proper to which it gave its name.

We must also refer to another method by which satisfaction was obtained, the *Pignoris Capio*. This seems to have been always confined to very special cases. These are said by Gaius to be introduced, some by custom, others by statute. To custom he

[1] P. 253. [2] *Der Geist des Römischen Rechts*, i. 154.

refers the right which a soldier had to seize goods of the paymaster by this process; and to statute the claim to enforce in this way sundry payments connected with religious rites. It must be noticed, however, that the statute in question is a Law of the Twelve Tables, and probably only settled previous custom. Ihering supposes that this became a proper action in the same way as the *Manus Injectio*, whenever a question was raised as to the legality of the seizure. To this matter I shall return later on.

CHAPTER IX.

THE JURISDICTION OF THE PONTIFFS.

We have still to consider the Rights which arose from obligations other than those of debt. I have already given reasons for surmising that the original contracts between man and man resembled in more than one respect the treaties between tribe and tribe, and indeed were modelled upon the pattern of these. At a time when there were no courts of law, moreover, it was convenient to obtain such sanction for a private contract as was obtained for an inter-tribal one. With this we may connect the fact that at Rome perjury was always reckoned as a sin against the gods, and so came within priestly cognisance. As soon then as a contract (*sponsio*) had been made, and had been ratified with an oath, it was easy to secure its fulfilment. At first we may imagine that contracts like property would be respected, and all the more for the fact that they were protected by divine sanction, while property was regarded as a matter purely secular. But in course of time, when a more real sanction was required, it was an easy matter to secure this, inasmuch as at Rome divine sanctions were enforced by the priests. To them, therefore, the injured party

appealed, and after due enquiry we may suppose that pressure was brought to bear on the offender to induce him to fulfil his contract. This brings us to a matter which is of great interest but of equal difficulty. It is generally assumed that the priests in ancient Rome had a very great share in the administration of justice, but what that share was is not so easily determined. The materials which we may use for such an enquiry are of three kinds—the traditions and history of the Romans themselves, the knowledge which we possess of other peoples in a similar condition of development, and the traces which have been left on Law and Judicial Procedure. I propose to bestow some attention on each of these sources in order to obtain reasons for forming an opinion on the question before us.

In the first place there is no doubt that tradition pointed in this direction. The best record of this exists in the well-known story of Cn. Flavius.

> For many centuries the Civil Law had been hidden away among the rites and ceremonies of the immortal gods, and was known to the *pontifices* alone. But when Cn. Flavius, a freedman's son and a scribe, to the great indignation of the patricians had been made Curule Ædile, he not only published the Civil Law, but set up in the forum notices of the days proper for legal business.[1]

In the next place we may allude to the history of spiritual jurisdiction in England, but it must be premised that the cases are not altogether parallel. Spiritual jurisdiction existed in England after the

[1] Valerius Maximus, ii. 5, 2; see also Livy, ix. 46; Cicero, *De Oratore*, i. 43; Dionysius, ii. 73.

Norman conquest, and, indeed, at that time advanced its boldest claims; but here the temporal power existed with it side by side. At Rome, we can hardly suppose this to have been the case. According to Roman tradition, indeed, the State was first firmly founded, and then Religion was added at a later period. In other words, Romulus was placed before Numa. But in those early times, when the people were just emerging from a condition in which Religion has overwhelming power, and human laws are only beginning to be separated from divine laws, there is no doubt that the order was reversed. At a time when the State was still a loose aggregate of clans, and the chief bond between them was their common obedience to one general in times of war, the priests probably attained a power which is to be rather deduced from that of the Spiritual Courts in England than compared with it. If the latter attained to such influence in spite of a firmly established temporal power, how much greater must have been that of the former who had no regular secular jurisdiction to contend against? It must be remembered, too, that there was never such jealousy between the Church and the State in Rome as there was in England. Spiritual supremacy was, indeed, an outcome of the Roman Empire, but in the beginning of Rome it had, as such, no existence. Rather we may say, that a separation between the spiritual and temporal powers had not been thought of. Nowhere more than at Rome was the whole national, as well as the whole individual life encircled and penetrated by religion. To such an extent,

indeed, was this the case, that the Roman never dreamed that holy offices were to be deputed to a particular class. The *paterfamilias* offered the family sacrifices, as the King offered those on behalf of the people. The priest's business was merely technical. The most important duty in man's life was to propitiate the gods. For this many rules grew up, rules too numerous for ordinary men to know. Hence the necessity for a priest in the very earliest times of Rome. Long before separation of interests had led to the rise of the Civil Law, the separation of the people from the gods had led to the rise of Ceremonial Law. The course of events after that is plain. There is at first no distinction between the professions. The man with technical training is divided from the man without it, but the former is expected to do everything in which special knowledge is needed. Exactly, then, as at a later date the arts found their home in the monastery, so in early Rome engineering skill was found in the college of pontiffs, and from their duty of keeping in repair the wooden bridge that spanned the Tiber, their name is supposed to have been taken. In the same manner, again, as ecclesiastics found their way into many departments of Law in mediæval Europe, so upon the rise of Civil Law in Rome it fell naturally under the care of the priests. When in England the contest between the spiritual and temporal powers had reached its height, it was found necessary to end the conflict by making the Church definitely subservient to the State. It was impossible, however, to get over the anomaly due to Christianity,

that the Head of the Church could exercise no religious function. In early Rome, as I have said, it was different. The State and the Church were absolutely one. The State officers represented the people before the gods, and the business of the priest was merely to give advice as to the proper conduct of ceremonies. From all this we see that we may suppose the pontifices to have acquired greater authority than the spiritual courts did in England. They had their origin before the temporal courts were regularly established, and they could add judicial duties to their office without exciting popular suspicion. If, then, we consider the extent to which these Courts acquired jurisdiction in England, we shall be in a position to realise the state of things in early Rome.

Now in the former country this jurisdiction took two directions; it attempted to check the sins of men and to manage their temporal affairs. The former we may call their criminal, and the latter their civil jurisdiction. In Saxon times there was no proper separation of the temporal and spiritual powers. The Bishop sat side by side with the Earl in the county court. After the Conquest, however, this system came to an end. By a charter of William I. the two jurisdictions were separated, and from this time is dated the rise of the spiritual courts. A sketch of their criminal jurisdiction has been recently given by Mr. Justice Stephen in his *History of the Criminal Law* (ii. 399 *et seqq.*), and from that source the following particulars are taken. The crimes with which the spiritual courts dealt were of course connected directly or indirectly

with religion. Crimes connected directly with religion are those which consist in opposition to its doctrines, or non-observance or other violation of its ceremonies. Of this nature are heresy and neglect of religious rites. These, of course, fell within spiritual jurisdiction. All crimes, again, are connected indirectly with religion, for an offence against the State is almost necessarily an offence against Divine Law also. But there are certain grave offences, not so much disturbing public order and so calling immediately for State interference, as rather by their immorality cutting at the very foundation of society, and thus suitable for spiritual censure. Conspicuous among these are those which arise out of the relations between the sexes. Hence offences not directly connected with religion, which come under spiritual jurisdiction, may be divided into those which do not and those which do affect these relations. The first class contains offences against truth and honour; whether the party be bound by an oath to tell the truth or to observe a contract, in which case it is perjury; or whether he only violates that honourable confidence which should exist between man and man, as in breach of faith. These offences are chiefly important for the influence they have on temporal matters, and I shall refer to them again further on. The other class included all the offences of the nature described. "Every form of incontinence, whether committed by clergy or laity, and whether or not it involved adultery, was habitually censured, the parties being cited, put upon their oath to answer the questions proposed to them, and adjudged to penance of various

kinds" (ii. 411). It is to be noted, however, that no direct power of compulsion was given to the ecclesiastical courts. Should any such course be necessary, they must hand over the offender to the secular power. Their own sanction lay in excommunication, which was of two kinds, the greater and the lesser. "The lesser excommunication deprived a man of all the offices of the Church. The greater cut him off from the society of all Christians, and both involved a variety of civil incapacities" (ii. 412). Amongst these were inability to sue, to give evidence, or to receive a legacy.

If now we turn to the civil jurisdiction of the spiritual courts, we find that here too their power was considerable. The institutions over which they naturally acquired control were marriages and wills. The latter brought with them a general management of legacies and of the estates of intestates. More interesting, however, for our purpose is the attempt the courts made to turn their criminal into a civil jurisdiction. I have said that the former involved perjury and breach of faith. An attempt was, indeed, made at an early time to convert questions of property into trials for perjury, but the fiction in this case was too obvious. Contracts, however, which depend for their fulfilment on the conduct of the parties concerned, could be treated otherwise, and it is easy to understand that every complaint of a violation of contract may be equivalent to a charge of immorality. The result is at once seen when we have ecclesiastical courts eager to extend their jurisdiction. Thus we read in Reeves' *History of English Law* (i. 123):—

In the reign of Stephen the clergy began to draw into the spiritual courts the trial of persons *pro læsione fidei*, that is, for breach of faith in civil contracts. By means of this they took cognisance of many matters of contract which belonged properly to the temporal court. This was the boldest stretch which that court ever made to extend its authority, and would in time have drawn within its jurisdiction most of the transactions of mankind.

Mr. Justice Stephen points out that this was counteracted by the introduction in the temporal courts of the action of *assumpsit*, in addition to the old action of debt and covenant. He also enumerates various other cases in which the same course was taken by the spiritual courts, as, "not abiding by arbitration, not completing a contract of service, keeping a promise, or restoring a pledge" (ii. 409).

Such was the jurisdiction, criminal and civil, which the English spiritual courts either enjoyed or attempted to enjoy. The similarity which it bears to that of the Roman courts is very striking, and there, as we have seen reason to believe, it existed in an intenser form. We must remember also that the Roman court was not left solely to excommunication for its sanction. It could impose fines and it could pronounce a man *sacer*, and this, though in some respects similar to the modern excommunication, was far more severe; it is supposed indeed, though not unanimously, to have rendered the criminal liable to death at any man's hands. I have already, in a former connection, spoken of the criminal jurisdiction of the priests. We may now confine ourselves to their civil jurisdiction. This was almost precisely the same as that which has just been described.

With the Romans marriage was originally a religious ceremony (*confarreatio*), and so was subject to regulation by the priests. The sacred rites of every family were under their care, and thus they kept watch on all events which might imperil their existence. Their presence, therefore, was required at an adoption in its oldest form (*arrogatio*), and so too at the making of a will according to the earliest practice. This, indeed, was at first so extraordinary a matter, the claim to control property after death such a grave extension of the "subjective will," that the presence of the people was required also (*in comitiis calatis*). In this way the people sanctioned the transfer of property, and the *pontifices* guarded the *sacra* of the family.

So far I have employed various proofs to establish the fact that the pontifices had a large, if not exclusive, control over legal matters. I have quoted the tradition preserved by Roman historians; I have showed that the position of these officers in a primitive society would lead to such a result; I have adduced the course taken by ecclesiastical jurisdiction in other similar circumstances; and I have pointed to the known influence of the pontiffs on certain legal institutions. All this makes it easy for us to accept the testimony of Pomponius recorded in the Digest. In the course of an account of the origin of Law, he says (D. 1, 2, 2, 6):—"The science of interpreting all these laws as well as the actions necessary for enforcing them was vested in the college of pontiffs, and from among these some one was appointed every year to preside over private matters."

I shall now return to the method I was previously pursuing of inferring from the existence of Rights the origin of their appropriate remedies. We have seen that certain Rights of property arose by a *mancipation*. In such cases the Right was perfectly definite, and there were witnesses who could establish it. If, however, it was contested, the parties chose an arbitrator and were bound by his decision. This leads to the *Actio Legis Sacramento*. In some cases, again, where the Right of property does not vest clearly in a single person, but a division between several has to take place, there is no question of the support or testimony of witnesses, and the parties have merely to select an arbitrator. I shall attempt to show further on that this practice leads to the *Judicis Postulatio*. Originally, too, as we have seen, debts are intimately bound up with the transfer of property, and hence are constituted by a *mancipatio*. In this case there was as a rule no doubt, and the creditor at once proceeded to a "*Manus Injectio*." If, however, an objection on the ground of legality was raised, a vindex might appear for the debtor, and this gave rise to the action of the same name.

We must now bear in mind the attempts made by the English spiritual courts to get possession of jurisdiction over contracts, on the ground that their violation involved a breach of faith. The probability is very great that some similar attempt was made by the pontifical court at Rome. The English court grounded this claim upon its jurisdiction over perjury and breach of faith. In considering the course taken

by the Roman court the following passage is interesting, and may supply some useful hints. It occurs in the course of an account given by Dionysius of the reign of Numa (ii. 75):—

Numa, seeing that contracts concluded publicly and before witnesses, are faithfully kept through respect for the presence of the witnesses, and that very few violate them, whilst those which are made without witnesses, and these are by far the largest number, depend entirely on the good faith of the contracting parties, thought that here was a matter which specially merited assistance, and that good faith ought to be held worthy of divine honour.

Thinking then that fidelity in public matters was the best security for private probity he erected a temple of *Fides Publica.*

Thus the scrupulous exactness of the republic in keeping faith could not fail to pass in course of time into the manners of individuals.

Hence it was that a simple word came to be as strong as any witness, and that an oath was sufficient to decide a law-suit.

We have already seen reason to believe that contracts were originally modelled upon treaties or international agreements, and it is natural to suppose that at first they were exceptional things, entered into with much care and solemnity. Hence, just as in mancipations, there would be no doubt as to the existence of the contract, and public opinion would be sufficient to enforce its observance. Moreover, though questions might arise even where a mancipation had taken place, this would be less likely to be the case with contracts. At the present time questions as to

contract chiefly relate to the existence of a particular contract, or to the rights of parties in the case of conflicting contracts. But in early times affairs were too simple to render conflicting contracts likely, and so long as the formalities were observed there was no doubt about the existence of the contract. Hence arbitration in matters of contract, whatever form it might assume, would be of later origin than arbitration in matters of property. But as these became more frequent and penetrated more into daily life, *i.e.* as they forgot the model upon which they were formed, some of the formalities doubtless dropped off, and at length contracts were concluded which depended upon the mere word of the parties. At this point, too, it was probable that violation of contracts also became common. The question then arises, What authority was likely to gain control over them? Of course it would be possible for one party to refer the matter to an arbitrator, but this is essentially different to a question of property. The other party will refuse to appear, will deny all knowledge of the matter, and many difficulties will arise. We have, however, an easy solution, drawn from the circumstances of the case and from the historic parallels already given.

The pontifical court may be assumed to be, in some form or other, already in existence. It undertook, as we have seen, the punishment of certain crimes, and had a general religious jurisdiction. If we remember, too, the course that was taken by the spiritual courts in England, it will hardly be rash to suppose that the first remedy of a person who felt

himself aggrieved by the violation of a contract was to appeal to the pontiffs. It is not improbable, that though other formalities had been dropped, the oath had been retained. It was of almost universal occurrence among the Romans, and a curious passage in confirmation of this occurs in the author quoted above (Dionysius, i. 41).

Those who wish to make a firm and binding compact take an oath, and make their agreements at the altar of Hercules.

Hence the violation of the contract was perjury, and this we know to have been an offence within the cognisance of the spiritual court. We must not lose, moreover, such assistance as may be afforded by etymology. We have already seen that the original idea in *jus* is that of binding, and the connection between this and *jurare* is too obvious to be overlooked. The binding of two parties by a contract was so frequently accompanied by an oath, that the word for taking an oath was derived from this association. Where two parties were to be bound, there was an oath to be looked for, and hence the meaning of *jurare*. Now in tracing the origin of actions, we have surmised that disputes upon *mancipations* led to the *Actio Legis Sacramento;* that other disputes upon property led to the *Judicis Postulatio;* and that debts incurred by a mancipation led to the *Manus Injectio.* I am now going to hazard the suggestion, that obligations made on oath, though they fell at first under the criminal jurisdiction of the spiritual court, led afterwards to the founding of the *Condictio.* Another explanation has been recently given of this action by Sir Henry Maine in *Early*

Institutions (p. 259); but where so much is necessarily left to surmise, perhaps it may not be presumptuous to offer another founded upon a general review of the circumstances.

The points to which I wish to call attention are the meaning of the deposit in the *Legis Actio Sacramento*, and the delay of thirty days after making the deposit in the *Condictio*. Sir Henry Maine explains the deposit as being a reward intended for the arbitrator, and accounts for the delay by supposing that the dispute has arisen where there can be no immediate reference to arbitration. It seems to me, however, that this latter circumstance would be of almost universal occurrence, and that it is more natural to ascribe the origin of the *sacramentum* to the cause which he assigns for the *condictio*. I think, indeed, that too much weight must not be allowed to the well-known comparison of the deposit with the rewards for the judges depicted in one of the pictures upon the shield of Achilles.[1] In the present day, even, there survive traces of an opinion, probably derived from the Romans, that legal knowledge is superior to the vulgar desire for reward. When, indeed, law comes to be a profession, means have to be discovered for supporting its professors, and the above principle becomes a mere inconvenient figment. But in early times the service rendered by giving an opinion on law, may be sufficiently rewarded by the honour done to the arbitrator in choosing him as a man whose judgment is to be relied on. It seems to

[1] *Ancient Law*, p. 377.

me that Sir Henry Maine's suggestion that a resort to immediate violence is prevented by a bet between the parties, is just as useful to explain the origin of the deposit in the *Legis Actio Sacramento* as to account for the peculiarities of the *Condictio*. We have, indeed, still to explain the ultimate destination of the deposit, and this may give us a clue to the change in the meaning of the word *sacramentum*. I have said that it is probable from what we know of Roman customs that the forfeited stake did not go to the arbitrator, and as a matter of fact it went to the public treasury; as, then, the chief burden which fell upon the treasury in those times was the expense of the public sacrifices, this was equivalent to devoting the sum at once to the service of the gods. This will account for both the original and the subsequent application of the money. From the fact that the stakes were paid to the pontiffs,[1] Ihering argues that these were originally the judges, and that the stakes were offered to the gods as a compensation for the loss of the time of their priests. The obvious objection to this is that the pontiffs were not priests in the ordinary sense—that is, they were not devoted to the service of any particular god. They were rather servants of the State than servants of a god; and although they possessed all the technical knowledge—religious, scientific, and legal—of the time, yet this is no reason for confining the choice of judges entirely to them. They doubtless acquired a great power over legal rules, and the ordinary judges may have resorted to them for opinions, but the

[1] *Der Geist des Römischen Rechts*, i. 298.

existence and purpose of the *sacramentum* can be explained without supposing that they were actually engaged in every action. This was by custom devoted to the service of the State, *i.e.* given to the Pontiffs to provide for the public sacrifices. Hence the stakes were deposited with the Pontiffs at a certain place near the Pons Sublicius, and the one that was forfeited was appropriated by them for the above object. If this view of the matter be correct, we find the Pontiffs in contact with civil affairs at two points. When there was a suit upon a question of property, this was commenced by a wager between the parties, and the stakes were deposited in a sacred place under the care of the Pontiffs. From this fact the use of the word *sacramentum* seems to have been derived. Hence it comes to denote money paid by way of penalty, and it is defined by Festus as meaning "*æs quod pœnæ nomine penditur.*" But he also defines it as denoting "*quod jusjurandi sacratione interposita geritur.*" The transition from one meaning to the other will not appear difficult if we regard the Pontiffs as being also judges in matters of contract which had been concluded with an oath. The party who was in default was liable to a fine, and probably this received the same name as the sums of money which were forfeited in the *Actio Legis Sacramento.* There is, then, no improbability in imagining that the name of the fine was transferred to the oath by which the liability to it was incurred. At any rate, as we know that such a change in meaning did take place, the course here suggested seems sufficiently plausible to be worth mentioning.

So far, we have seen Justice organising itself. The possibility of this depends upon the power which public opinion still retains and the general desire to live at peace within the tribe. Some matters, indeed, there are, which do not well accommodate themselves to this state of things, and these are undertaken by the Spiritual Court. To a certain extent such a view, no doubt, is ideal. Justice of this kind is occasionally attended by scenes of violence, and obviously misses its mark, though in this latter point, perhaps, it is sometimes imitated by Justice of a later date. It is this violence, however, which first brings into prominence the necessity for State interference. It must not be imagined, indeed, that the State has been idle hitherto. Although we have supposed it to be excluded from civil matters, it has been gradually acquiring a criminal jurisdiction. There is strong reason for supposing that this was originally merely an extension of the necessary power possessed by the general over the army, a power not inherent in the general himself, but which arose when the *imperium* was conferred upon him by the assembled people. Among the citizens themselves, indeed, the principle of co-ordination reigned: it was only in the army that that of subordination was introduced.[1] That the effect of this was very great may be understood, however, when we remember how thoroughly the military organisation of the Romans pervaded their whole life. It was therefore not difficult for the King to extend that power of punishment which was found

[1] Ihering, *Der Geist des Römischen Rechts*, i. 253.

necessary in the army to other cases that called for it in private life; and though this was resented by the people as an arbitrary exercise of power, yet the principle was too valuable to be given up. Hence arose a general criminal jurisdiction with power of life and death over the offenders; but the fact that it originated only in the consent of the people was never forgotten, and the condemned criminal had a right to have that consent confirmed in his own case by an appeal to them. It is curious how the union that binds men together, and makes them submit to discipline for purposes of warfare, is taken as the starting-point for organisations of all kind. We have an example here in the fact that the control of Justice by the State springs directly from the army, and Comte, when he was advocating the organisation of labour, was satisfied with the hope that the old ideas and sentiments which had been generated by warfare, might repeat themselves in the altered circumstances of the future. A similar idea, indeed, though it did not originate, yet tended to the centralisation of criminal justice in England. The Norman kings may not unfitly be compared rather to generals than to modern sovereigns, and local jurisdictions died away as the idea gained currency, that crimes of violence were not so much injuries to the individual as violations of the King's peace.

We are now able to take up the development of Justice as it appears in the various *Legis Actiones*. The system of settling by arbitration disputed claims to property has long been in force. The increase of

the people, however, and the loosening of the bonds of kinship, make actual quarrels between individuals more and more common. To repress these, a power imitated from the authority of the general over his soldiers has been introduced, and order is thus maintained in the community. Moreover, the development of judicial authority takes two directions. Thus the spiritual power obtained jurisdiction over contracts, because their violation involved a sin against the gods. The temporal power obtained jurisdiction over property, because the quarrels that arose about it involved a disturbance of the public peace. But, in the latter case, there was no immediate interference in legal matters. All that the King or Prætor required was that these contentious parties should submit their case to an arbitrator, just as all reasonable people were accustomed to do; and as they were probably too far gone in passion to agree upon such a one themselves, he proceeded to appoint one for them. To this person he briefly stated what the case was, and left him to decide it. We thus seem to have at the very beginning of State interference the distinction between *jus* and *judicium*. The State, indeed, so far means merely power; its legal functions have not been acquired. But we already have the *judicium* properly constituted, and it seems to me probable that in certain matters, those relating to property and debt, the judges originally were, or at least might be, laymen. I have already tried to show the erroneousness of the opinion that the *sacramentum* was a reward paid to the gods for the time that their

priest consumed in the trial. I may also remark that there is no necessity to suppose an invasion of the spiritual jurisdiction when these sums of money were afterwards devoted to secular purposes. At all times the forfeited stakes went into the public treasury. At first, however, this was equivalent to handing them over to the Pontiff for sacrificial expenses. Later on, when the public burdens increased, they went into the treasury really, and only a proper proportion of them was devoted to that purpose.

We thus have before us a temporal and a spiritual jurisdiction side by side. Matters of property merely, and matters of debt when disputed, come before a lay judge according to forms of procedure known as *Legis Actio Sacramento* and *Manus Injectio* respectively. Matters of contract come before the spiritual court upon a charge of perjury. The further development of the actions seems simple. Although contract fell so easily under the cognisance of the Pontiffs at first, it was not likely to remain there long. It was an attempt to make such matters depend upon *fas*, and it was soon clear to the Romans that they depended properly upon *jus*. The first attempt to secularise contracts may have occurred in connection with a forced use of the *nexum*. It was for many reasons inexpedient to incur the chance of being brought up on a charge of perjury. The accused party might have good reasons for not fulfilling his contract, and while willing to pay reasonable damages to his opponent, he might have strong objections to pay continual fines to the priests for contumacy. The *nexum*

had already been used for entering into one kind of contract—a contract to return money. In this case the money was actually transferred by the *mancipatio*. It may have occurred, then, to people seeking a means of making a secular contract, that the same thing could be done, but the transfer of the money omitted and assumed for convenience to have taken place. In this way any contract could be made on condition of the payment of a sum of money as liquidated damages on non-fulfilment. So far the growth of the action has been natural—unassisted, that is, by actual legislation. But Gaius gives us the exact laws by which the *Condictio* was established and extended. It was created by the *Lex Silia* (circ. B.C. 244), for the recovery of a certain sum of money, and extended by the *Lex Calpurnia* (circ. B.C. 234) to the recovery of any certain thing. It was thus of comparatively late introduction. We may suppose that the system described above had been in force all this time; for we know how long the most cumbersome legal forms may exist before the Legislature touches them. The authority of the pontiffs over contracts had probably been diminishing, and the practice of concluding them by the inconvenient *nexum* extending. Finally, it became obvious that the proper course was to retain the simple method of contract and give for it an appropriate secular remedy.

The new action was copied closely from the process in force for an obligation contracted by a *nexum*. The stake was still retained, though now made to bear a fixed ratio—one-third—to the sum in dispute. The

parties, indeed, had not to appear at once before the Prætor, and then wait for thirty days for a judge to be appointed. There was no reason for this formality, connected only with the real actions, to be continued. The same interval indeed was observed, but it was commenced by simple notice to the defendant, and thirty days after this the parties had to appear before a Prætor to receive a *judex*.

There are still two of the *Legis Actiones* which we have to consider, the *Judicis Postulatio*, and the *Pignoris Capio*. I have already surmised that the former took its origin in cases where there was no direct contest as to property, but merely a desire to obtain such an opinion upon its division as should satisfy the parties concerned. It is, of course, not improbable that this was done at first by the voluntary selection of an *arbiter*. But at a later time, when the authority of the State in legal matters was becoming confirmed, and all ordinary disputes were brought in the first place before the Prætor, it was natural to adopt the same course here also. It must be remembered that the State interference consisted first in forcing an arbitrator upon unwilling disputants; it was extended afterwards to the appointment of that officer in all cases. This supposition gives a satisfactory reason for the name of the action in question. Neither party asserts that he has as yet a definite claim to the thing in dispute. There is therefore no question of a wager on either side. Nor is there any contract between the parties of which the Pontiffs can lay hold. All that they do is to go,

by mutual agreement, before the Prætor, and ask him to appoint an *arbiter* to effect an equitable division. If in such a procedure we can see the *Judicis Postulatio*, we shall have here the origin of the later actions *familiæ erciscundæ*, *communi dividundo*, and *finium regundorum*. We must not forget, however, the received opinion that this action was used in cases of bilateral contracts,—that it was applied, indeed, wherever there was a necessity to adjust the mutual claims of both parties. If we remember the original tendency to confound real and personal actions, this matter will afford no difficulty. The reference of disputes on contracts to an *arbiter* has already become common through the fictitious use of the *nexum*. Men are familiar with the idea of employing in matters of contract an action originally meant for property only. Consider, then, what must be done if a question of account has to be settled between a tutor and his pupil. There has been no *nexum* here; therefore the *Legis Actio Sacramento* cannot be employed. There has been no *sponsio*, or contract on oath between the parties; therefore the Pontiffs cannot interfere. There is, however, a procedure in use for settling such matters as to property; and as, indeed, these questions between the tutor and pupil really concern property only, nothing seems simpler than for the parties to appear before the Prætor and demand an arbiter, *i.e.* commence the action known as *Judicis Postulatio*. The essence of this action, then, is the adjustment of the unsettled relations between the parties. At first it is applied to matters of property pure and simple,

and then to matters of property as affected by the mutual obligations of the parties. Its transfer after this to all matters of bilateral contract appears natural and easy.

With regard to the *Pignoris Capio* I feel some hesitation in speaking, since the question of pledge has been so fully discussed by Sir Henry Maine in *Early Institutions* (chapters ix. and x.), and his account of distress among Teutonic societies and "*sitting dharna*" among the Hindoos is well known. It is, however, one of the principles upon which the whole of the present investigation is founded, that the Roman legal system may be expected to differ considerably from other systems. Deviations in the course of a nation or of an individual may be due to accidents, but a development which takes a continuous and steady direction is based upon permanent causes. We can hardly account for the wonderful development of Roman Law, and its remarkable vitality as a system, without assuming an original aptitude in legal matters which has been wanting among other nations. I have already given reasons for rejecting the idea that there was ever a spirit of individual combativeness among the Romans. A Law and an Imperial authority that were to take a front rank in the world's history may be assumed to have sprung from a love of order and a power of self-control that existed in the earliest days of Rome. Modern inquiries show that in the primitive state, while men are still bound together in families, union and order is preserved by the ties of family interest and affection. As the family

increases to a clan, and the clan to a nation, these ties disappear. The result which then ensued among the Romans was probably due to an inherent genius for Law and Order, and hence, perhaps, Order was long preserved and Law gradually developed without the interference of the State. When this was at length necessary Law was already well established, and was fostered rather than created by State assistance. Among the Teutonic tribes this development was wanting. Hence we have those customs of lawless disorder which the State at length attempts to control, and which survive to modern times as taking of distress and wager of battle. But whether these would ever have been controlled, had they not come into contact with the Roman Law, may be a matter of doubt. As to other savage tribes who have remained fighting out their quarrels to this day, the system is only stopped, as we see in India, when a Law already organised steps in and insists that Justice shall be attained in the proper civilised way.[1] In all these cases, then, the realisation of Justice is due directly or indirectly to the effect of the Roman Law. That such effect is universal is, of course, not intended. The products of one part of the world are found in another also. Law may be developed in Southern Africa as well as in Italy. My present contention amounts simply to this, that the enormous superiority which Roman Law has displayed over that of all other Aryan societies, may well be assumed to be due to certain peculiarities in the Romans themselves, and

[1] *Early Institutions*, p. 289.

hence we need not credit them with all the disorder and violence which has attended the growth of Law elsewhere. The immediate object of these remarks is to justify a somewhat different treatment of the *Pignoris Capio* to that which would naturally follow from a perusal of Sir Henry Maine's work. He does not, it is true, deal with this institution in its Roman form specifically, being content with a mere passing allusion to it. It will be the easier, therefore, to put upon it in this place a rather different complexion to that which it wore among the Teutonic and Celtic societies. The point from which we start is, that at the earliest period of which we have any knowledge, this process was extremely limited in its application, and was only permitted for the purpose of enforcing payments connected with the service of the gods. With this we must connect the extreme reverence with which private property was regarded among the Romans. It was, indeed, one of their peculiar institutions, and to them its diffusion over the civilised world is largely due. We may well imagine, then, that in this very cradle and home of property practices would not be permitted, which sprung up easily where property was looked upon with less respect. With the Romans, indeed, the connection between property and the person of the owner was close and intimate. They were not far removed from the time when the idea of the foundation of property in the personal prowess of the individual was prevalent. It was long, indeed, before the State itself went so far as to meddle directly, even in the shape of taxation,

with private property. It would almost seem as though the person of the owner was less sacred than his property, and as if the latter could only be reached through the former. How else can we account for the fact that while the *Manus Injectio* was still the proper remedy in matters of debt, the *Pignoris Capio* was so extremely limited in its application? On the other hand, it must be remembered that property, as we have seen, was never taken directly under divine protection, and theft never became a sin like murder and adultery; but even this is not altogether true, for the boundary stones of the fields were consecrated, and the removal of them was consequently an offence against the gods.

From all these circumstances I am inclined to suppose, that the *Pignoris Capio* was never prevalent among the early Romans like the taking of distress elsewhere. It had too great a resemblance to theft to be allowed, and though no Divine Law punished this, yet it cut at the root of the Civil Law. Hence it was only permitted when the Divine Law itself needed aid. The idea of distress was present with the Romans as with others. That in many cases it was practised there is little doubt. All I am assuming is, that in ordinary cases it never became so prevalent as to come under the regulation of the Law, and so to be incorporated in the Roman procedure. Only in the one case mentioned above did this happen. When a man, through a failure in special cases of a debtor to pay his debt, was unable to offer his proper tribute to the gods, then by common consent a dis-

tress upon the goods of the debtor was permitted. As in the case of the *Manus Injectio*, it may be supposed that this in later times was reckoned as an action at law, because it occasionally raised a legal difficulty which called for decision. In such a case, it seems reasonable to suppose that the same officers under whose sanction the process was carried out would be appealed to for guidance. The *Pignoris Capio* would thus be originally an action before the Pontifical court. But the practice of distress when it can be carried out in an orderly manner is a valuable institution. Inasmuch, then, as the Romans were debarred by their respect for property from instituting it directly, they reaped its advantages, perhaps, in another way. When distress in the above case had become a regular thing, and it was seen that under the proper supervision of the spiritual court it led to no disorder, a fiction was introduced by which its operation was extended. For this surmise, I am indebted to Mr. Poste in his edition of Gaius (p. 512). The averment by the plaintiff, that through default of his debtor he was unable to perform his religious duties, justified his distress if the matter should come before the court. Upon this supposition, the practice which among other nations originated in disorder, was among the Romans instituted in a legal manner. It speedily found favour, for it was a convenience to creditors, and the Pontiffs were glad of this opportunity of extending their power. Such an eagerness for jurisdiction does not suppose a special rivalry between the temporal and spiritual courts, and in later times it has assumed a

very intense form between co-ordinate temporal courts. By this means, however, the Pontiffs made a still further inroad upon the domain of contracts, and we may see here, perhaps, another reason for the introduction of the *Condictio*. But though in later times it fell into disuse, its value was too great for it to be entirely forgotten. Thus there were cases of universal importance in which sums of money were undoubtedly due, but where there was no express contract upon which a *Condictio* could be founded. Of this nature were the claims of the soldier against the paymaster for arrears of pay, and for money to buy a horse and fodder for the horse. This, therefore, became by custom a proper matter for the levying of distress, and the custom was duly recognised by the Law. There is some boldness in advancing the above view of the *Pignoris Capio*, and it may be difficult to substantiate it by any arguments more direct than those I have adduced. The fact, of course, which may be used against it, and which perhaps will be fatal to it, is the universal practice of distress as prevailing elsewhere. It has seemed, however, that the peculiar circumstances of the Roman people warranted a special treatment of the matter in their case, and what I have said on the subject seems to harmonise with the general principles that I have been maintaining.

We have now completed our survey of the different *Legis Actiones*. It has been marked to a large extent by assumptions, and some of these may be found to be untenable, but I have tried to pursue a consistent method throughout. We have considered the origin

of the different Rights as they sprang up one after another in ordinary life, understanding by this term claims to the enjoyment of such advantages as may be produced by our own use of material things or by the acts of others. These Rights are originally confined to property, and here they rest upon the personal prowess or excellence of the individual. This, however, is exerted over the members of another tribe. There is, as yet, no competition among those of the same tribe, and only that which is captured from an enemy belongs to the capturer. Then ensues a division of land taken from the enemy, and each man, though his portion is allotted to him by general consent, feels, nevertheless, that he holds it as the reward of his valour. The same idea still prevails when the communal land is divided, though the dependence of Rights upon the general will is now coming into existence. Rights, however, spring originally from the subjective will and personal force of the individual. This, however, does not imply indiscriminate violence. The force is directed against outsiders and approves itself to the conscience of the plunderer and his companions. Then come Rights of another kind. Men enter into engagements with one another, and thus we have Rights *in personam*, which spring not from the power of one person but from the free consent of two. So far we have Rights existing in the simplest and in perhaps an ideal state. They require no regulation, for they are perfectly definite. They require no enforcement, for the approval of the community is their safeguard.

But this state of certainty does not last. Some

Rights are doubtful in their origin, and a decision must be given between rival claimants. Others are transmitted from one to another, and as the Rights in the new owners depend no longer upon their own personal excellence, a new criterion has to be discovered. Hence Rights have not been in existence long before they require regulation, a process, however, which is at first a peaceful one. Rights are still respected; all that the parties want is to know what they are. Hence the rise of the system of arbitration. A further step is taken when the increase of the tribe loosens the bonds which have hitherto preserved harmony, and Rights no longer meet with general respect for their own sake. Hereupon the State interferes. The system of arbitration is made compulsory, and the awards of the arbitrators are carried out if necessary by force. The discipline that is so healthful for the army is imported also into civil life. Hence in this stage of Law, we have the origin, the regulation, and the enforcement of private Rights. Of the origin of Rights I have said sufficient. They rise in the personal excellence of the individual, or in the free consent of two individuals. Of their regulation I shall speak more at length further on. Upon their enforcement I have still a few remarks to add. If we may make use of an ingenious surmise as to the origin of the five witnesses in the early form of mancipation, we shall see that the Romans grasped at the very beginning the true nature of State interference.[1] The State cannot limit itself to the mere suppression of

[1] Cf. *Early Law and Custom*, p. 352.

disorder arising out of quarrels. It not only stops the quarrel and appoints an arbitrator, but it also enforces the award of the arbitrator; in other words, it makes itself a party to the award. We are now on the threshold of the creation of Rights by the State, and it is important to watch the germs of this process. Whatever Rights it enforces acquire an importance and security which were wanting to them before. Hitherto they have really rested upon the opinion of a few neighbours; henceforth they are supported by the concentrated will of the people. But this concentrated will has no wish to interfere with private Rights. In some cases, of course, the individual will may seem to assert itself too far, as when the idea of making a testament and governing the disposition of property after death first appears. Then the whole people must watch the matter and see that the general arrangement is not disturbed, and so the testament is made publicly in the assembly. But in other cases the people or the State merely desire that when they do enforce Rights these shall really be in accordance with the intentions of private individuals. Now, hitherto the witnesses at a mancipation have played a very important part. They have not only preserved in their minds a record of the ceremony, but, being the friends of the parties interested, they are expected also to assist if necessary in the enforcement of the Right thus created. But this is now all changed. The State in future is to enforce the Right. What more fitting, then, than that the State should also witness the transaction? It will itself be aware of the exact

intention of the parties, and will do nothing but scrupulously carry them out. Such is the interpretation that may naturally be put upon the presence of the five witnesses in the mancipation, a number which has been supposed to represent the five classes into which the Servian constitution had divided the people. In other words, we see that a system of registration lay at the foundation of interference by the State. The State had no desire to disturb the Rights of individuals; but how could these Rights be known if the people by their representatives were not informed whenever a change in them took place? As we have seen, contracts, so far as they were concluded by the mancipation, fell under the same rule, and the State refused to enforce any Rights of whose origin it had not had due notice. That contracts in general did not share the same fate is due to the fact that, according to the view set forth above, they did not come under State control till a later period. Dealt with as they were in the Pontifical Court, and treated in their relation to offences against the gods, there was no such reason for requiring the presence of witnesses at the time of making them.

We have now come to the end of what may be called the second stage of legal progress, the stage which sees the origin of private Rights and the growth of a State-power to enforce them. In the third stage we shall see these Rights increasing in number and complexity, and the consideration of the various rules which have to be devised to govern them will introduce us to the different forms of Legislation.

CHAPTER X.

THE REGULATION OF RIGHTS.

THE question of the regulation of Rights to which we now turn our attention is of the utmost interest and importance, and upon the view which we take of it will rest the position and functions we assign to the science of Jurisprudence. I have used the term *regulation* of Rights because this seems to indicate clearly the original legal operation. As to their creation there is so far no question. They arise in the personal prowess of the individual or in the assignment to him of his share of the common land. When, however, there is a doubt as to the person in whom a particular Right when once created shall vest, then there is a matter for regulation. Now if we go back to the earliest cases and consider the course adopted by the original arbitrators, we see at once in what these regulations took their rise. There was only one thing to be done in the absence so far of all rules. The arbitrator stated what his own sense of justice intimated was fair. But this sense of justice was merely derived from his knowledge of what was usually done in similar cases where no contest arose. In other words, the earliest decision could be nothing else than a record of

the customary practice in such matters. Now, of the actual growth of legal contests and the assignment of their decision to a special class we have little knowledge. But a time soon comes when the labour of giving a distinct judgment on each case is out of all proportion to the object attained. Every one who has to do the same thing over and over again, finds the immense relief of having some guiding rules to fall back upon instead of thinking out the matter each time, and this is all the more necessary when it is important that his results should have a certain consistency. If, then, we remember that the office of arbitrator would in all likelihood fall repeatedly to the same individual, we shall see how soon the necessity for legal rules would arise. It is an interesting question to consider how far this process was assisted by the existence of the Pontifical College. I have already given reasons for believing that they exercised a very powerful influence on legal matters, and it is not improbable that as soon as Law left the stage of mere common sense and became a technical matter, its study would fall into their hands. This does not suppose, indeed, that they would have the exclusive practice of it. The decisions in secular matters which I have described above were possibly always in the hands of the laity; but just as in the present day a judge takes an opinion from a work of acknowledged repute, so we may well imagine that the arbitrators in Rome would be glad to consult the College of Pontiffs when in need of a rule. That this state of things did not last long we know, for ultimately the Law

became a distinct profession, and indeed the most important one in Rome. But the fact that it existed originally doubtless gave a great impetus to the creation of legal rules, and confirmed them in that rigidity which they so often assumed. It would, however, be a mistake to suppose that this rigidity is a quality which attaches to them from the first. We may well suppose that the early arbitrators had a discretionary power which allowed them to adapt the rule to the circumstances of each case. The proper idea, we may say, of a rule of law is that it is an attempt to sum up current opinion upon a class of cases. The possibility of constructing these rules, however, depends on two distinct faculties, the faculty of observation and the faculty of expression.[1] Each of these has its own sphere and its own importance. We continually act upon rules of which we have no consciousness, and when we do try to realise them we often seize upon unimportant matters. Indeed it is often merely the accident of the violation of a rule that makes us conscious of its existence; our interest is then aroused, and we begin to enquire what the rule may be. A notable instance of this is afforded by grammar. Language exists and obeys rules more or less fixed long before grammar is thought of, and most persons talk with tolerable correctness who are quite ignorant of any rules. But in course of time it is noticed that deviations from common practice take place, and then people set themselves to discover what this common practice may be, and to express it in rules. Afterwards

[1] Ihering, *Der Geist des Römischen Rechts*, i. 28.

the rules have a tendency to fix practice; the language loses its vitality, and people do not always correct themselves by an appeal to their own perception of what is right, but by reference to a rule.[1] The same process goes on in Law. In its earliest stage every judgment is based on what we call common sense and is in accordance with the general sense of justice. But then comes a judgment in which this is departed from, and it is followed by an attempt to seize the points at issue and express them in a rule. This process was going on all through the history of Roman jurisprudence, and was not finished even then. The Digest contains a multitude of cases which are decided with much consistency, but in which the true rule has never been hit upon. Thus is opened a wide field for the ingenuity of the moderns, and we are able now to present a system of legal rules taken from the Digest which is far in advance of anything attempted in the time of Justinian.

An instance of this is found in the well-known controversy as to the real meaning of the rule that Possession must be obtained by bodily contact (*corpore*). Stated thus, it would appear that actual touch was in every case necessary. This, however, was seen to be in many cases untrue. Then the commentators began their work, and said that *corpus* must be taken in a wider sense. In early times, doubtless, it meant actual touch; but as the idea of Possession gained ground, it was found that sight would serve the same purpose. Hence, with a gen-

[1] Ihering, *Der Geist des Römischen Rechts*, i. 29.

eralisation worthy of some praise but for its absurdity, it was said that *corpus* should include perception by any of the senses, as though a Roman jurist had ever dreamt that Possession could be obtained by hearing or tasting or smelling. It was Savigny who first grasped the true rule when he dismissed all immediate notion of *corpus* as such, and showed that the acquisition was founded not upon bodily contact, but "upon the physical power of dealing with the subject immediately."[1] He also adds, "and of excluding any foreign agency over it;" but it has been rightly objected that this is not essential, provided one has present physical control. Indeed it will rarely be possible to exclude all foreign agency whatever.[2] The physical contact, then, which the Roman Jurists had required was no essential point in Possession, but merely an accident. Upon the true principle it becomes possible to explain without resorting to fictions why the Possession of a movable placed in my house is acquired by me, and why the delivery of a key transfers Possession of the merchandise placed in a warehouse. This is merely one example selected because it is well known. For another I may refer to the elegant series of rules deduced by Pothier for the decision of the question of accession, or of the union of different possessions in reckoning the time for usucaption. Of course the discussion of the correct rule in a case where the Roman Jurists were at variance is another matter, such as the question whether the

[1] *Possession*, Sir Erskine Perry's translation, p. 143.

[2] Windscheid, *Pandektenrecht*, sec. 153, n. 3.

existence of a *justus titulus* in acquisition of Possession was actually required, or whether a *bona fide* belief in its existence would do instead. Even here, however, by searching more narrowly for the principle involved, we may be able to show that the disagreement only arose through a failure on the part of the Jurists to seize it correctly.

But there is a possibility of error not only in the observation of a rule, but also in the expression of it. It would often be wrong to suppose that a particular rule was ever strictly applied by its authors in practice. When Law is still in its infancy and springs directly out of custom, the rule is often merely a guiding-post to the way by which a decision is to be reached. As I have already remarked, the judge depends not on the rule alone, but exercises his own judgment at every point. There are numerous circumstances which he takes account of, and which are not included in the rule, perhaps, because they are too well known. The actual rules of Law, then, are defective both in quantity and in quality. There are rules which the judges really act upon without ever expressing them in words: there are rules which express only a part of the principle applicable to the cases they cover. From this we see that the complete arrangement of the Law in rules, is a matter which requires considerable talent, and only in the infancy of Law can it be regarded as an unmixed blessing. There is not at that time such complexity of Rights that a rigid adherence to rule is absolutely necessary: they are, however, sufficiently complicated to make the inven-

tion of rules of great use, so as to facilitate decisions upon them. The judge has the rule to guide him on his way, but if the rule is not true to life he has no hesitation in filling up its defects from his own discretion. In course of time, however, this free discretion becomes impossible, and the judge has to keep more and more to his strict rules.

I must observe again that it is not the actual judge who makes these rules. I have surmised that this office fell at first to the College of Pontiffs, and both the probabilities of the case and all tradition point in the same way. Such an arrangement would favour the rapid growth of rules, and would withdraw them from that actual contact with life which is so necessary to preserve their freshness. This would account for the strictness with which they were first applied. Later on a change took place; a separation in the professions was necessary, and Law was entrusted to the laity. Although perhaps Roman Law owed its symmetry and strength to the early care of the Pontifical College, yet its vitality and permanence were due to the wise appreciation of actual wants shown by the lay Jurists. This, as is well known, was exhibited in two ways: in the successive reforms introduced by the Prætor, and in the opinions of the Jurists.

The mention of the Prætor in this connection carries us a step further in the history of State Law. At first, as we have seen, he represented merely the power of the State stepping in to avert bloodshed; he compelled the parties to choose an arbitrator,

while the arbitrator took his law if necessary from persons specially versed in it, and not improbably from the College of Pontiffs. This, however, was an arrangement that could not last long. I have already given reasons for the early strictness of the *Jus Civile*, but though it was well adapted for Roman citizens and for Rights of property created in special ways, yet its adaptation to the practical affairs of everyday life was not by any means perfect. In other words, the Prætor discovered at a very early period that Law and Justice were severed, and it appeared to him that as he was the person charged with putting the Law in force, he might without impropriety attempt to infuse a modicum of Justice into it. The long duration of Prætorian legislation and the beneficent effects it produced amply justified this procedure. Moreover, the secularisation of the Law, as we have imagined it, and the creation of a body of Jurists of distinguished rank, rendered possible a succession of Prætors eminently fitted for their post. The question of this legislation has been exhaustively treated by Austin (ii. 602) and Sir Henry Maine (*Ancient Law*, p. 62). It will be sufficient here, then, to point out how the creation and regulation of Rights were properly divided between the Prætor and the Jurists. The division, indeed, is not perfectly correct, because the work of the Prætor was nearly over before the work of the greatest Jurists began. We have, however, the germ of a principle which it is worth while to examine.

I have already pointed out the distinction between the origin and the regulation of Rights. In the begin-

ning of things this exists with some distinctness, but in course of time it is not so easy to draw the line. Rights are now not as a rule newly created, but the state in which they actually exist often offends the general sense of Justice. Hence it becomes necessary that a change should be made, and Rights are boldly taken away from one class of persons and conferred upon another. Thus to the origin of Rights in early times, which depended upon the will of the individual, corresponds in later times that change of existing Rights or establishment of new ones, which is effected by the combined will of the community. This, indeed, seems to mark the distinction between Legislation proper and Scientific Law. It is not, nor ever can be, the province of Science to effect a radical change in the Law, although by exhibiting its deficiencies in their proper light it may be instrumental in its reformation; nor is it the business of Legislation to descend into those thousand-and-one details upon which the actual application of the Law depends. The only result is to place rigid fetters upon the free play of human intercourse. It is as though the practitioners of a science were compelled to use a particular text-book. The progress of every science is the same. In Geometry comes a Descartes, and a revolution is produced; by no means, however, are the students of Geometry still condemned to use a text-book of the seventeenth century. The principle once received, improvements in its application are being continually perfected, until a Hamilton comes with his Quaternions to start the science on a new course. The same

thing is repeated in Law. The rules of Law depend upon a number of matters, upon knowledge of Economics, upon the progress of Ethics, upon changes in Society. At intervals, then, it is necessary for a radical change to be made. This is beyond the power of Jurisprudence. The pressure for change must come from other quarters, though Jurisprudence may point the way to it. The actual change, indeed, must be made by the combined will of all, for only so can conflicting interests be satisfied. But this once done, the sphere of direct Legislation is past. The details of Law form materials for a science of which in England there is hitherto but little conception. In Rome alone has its importance been fully realised and the best minds devoted to its pursuit. With us it is of yesterday's creation only, and its adherents are hardly sufficient to form a school.

Some such division of labour, though not, indeed, exactly carried out, is visible between the legislation of the Prætors and the writings of the Jurists. It has been suggested that the former were at first actuated rather by fear of convulsions than a love of equity, and that their reforms were meted out with a scanty hand. "At Rome, as the intervention of the Prætor was at first dictated by simple concern for the safety of the State, it is likely that in the earliest times it was proportioned to the difficulty which it attempted to get rid of."[1] In other words, the reforms were confined to such actual changes in existing Rights or recognition of new ones as the popular voice demanded.

[1] *Ancient Law*, p. 66.

Thus the dissolution of the old family ties had broken down the intimacy in which the *agnati* lived,—the relatives, that is, connected on the paternal side, to whom the Law awarded in certain cases the inheritance of an intestate. At this point the Prætor stepped in and decreed that division should be made among the *cognati*, that class who in course of time had come to correspond more to the actual family relations. But the most perfect example of the subject we are now discussing exists in the Roman Law of Possession. This is a matter, indeed, which in England has received but little attention, a fact which shows that the recent revival of interest in the Civil Law has not yet led us far into its details. This and similar errors will never be rectified until we realise that the Science of Law must definitely be studied for its own sake, with no immediate view to practice. For such purposes the study of Possession affords peculiar attractions. It is true that the subject is specially Roman. In England we have little that corresponds to it, for though a parallel has been drawn between it and equitable ownership, the differences are too striking to render the comparison of much value. It must not be forgotten that the institution of different systems of Law are rarely the same—a fact which seems to have been overlooked by Sir Erskine Perry when, in the preface to his translation of Savigny's Treatise on Possession, he urged that some one should write upon the corresponding title in English Law. A moment's consideration shows that such title does not, to any considerable extent, exist.

The fact is, that the interest attaching to the subject exists in the perfect specimen we here obtain of the creation of Law. Most Law, as we know, begins with Custom, and passes on to Legislation. Sometimes, but not always, Science gets hold of it before or after the latter stage. But in the case of Possession, though the element of Custom is not wanting, yet the Right, as such, seems to be created by Legislation. It is then passed on to Science, and we obtain a succession of rules gradually worked out by the Jurist and adapting themselves more and more to the requirements of actual life.

The origin of Possession is, indeed, very remote, but not so much so as to forbid plausible conjectures. Thus we have seen Rights arising by capture from an enemy, or by an assignment of land to the individual. There still remains, however, the rest of the public land, and although this may be occupied, yet no Right over it, according to the Civil Law, can exist. Then, we are told, the Prætor interposes with his interdict, and by protecting the occupant creates in him a Right. Such, at least, is the conclusion drawn by Ihering from Niebuhr's conjecture. A Right, according to him, is a protected interest. But Possession is obviously a protected interest, therefore Possession is a Right.[1] Professor Hunter, again, draws attention to the fact that foreigners could have no more than Possession of a thing, and hence rules on the subject must have been invented on their account also. Others are content to abandon the question of Right altogether, and

[1] *Der Geist des Römischen Rechts*, iv. 351.

to say that the Prætor merely interposed to prevent quarrelling, without intending to influence the legal aspect of the matter at all. The whole subject is, indeed, one of the greatest interest; but while Germany still produces treatise after treatise on the subject, nothing has been done to it in England. With us there seems to be an impression that Savigny is to be regarded as having closed the subject, though such is certainly not the opinion abroad. He cleared up, of course, many doubtful points, and his work marks an epoch in the study of the question, but it hardly gives a clear and intelligible account of the whole matter to a reader who comes to it for a solution of his difficulties. Indeed, he leaves us in one at least of the difficulties which beset the Roman Jurists themselves. The question that continually presses on them is whether Possession is a matter of Fact or of Law. On this point their work all tended in one direction. They saw more and more that the fact of Possession was the origin of a Right, and that the Right, once raised, must be governed by legal rules, quite apart from the Fact, just like any other Right. But Savigny does nothing to assist us on our way to a satisfactory conclusion when he asserts that Possession is both a Fact and a Right.[1] The statement may, no doubt, be true in a way, but it is perfectly useless. What we want to know is how the Fact came to be clothed with legal attributes, until in many cases it existed as a simple Right. For our present purpose, the subject is particularly important as illustrating the

[1] *Possession*, p. 20.

development of legal rules by scientific treatment, and of this the following example may be given.

It is well known that Possession must be gained by the acquisition of physical control (*corpore*), united with an intention to possess as owner (*animus domini*). When these exist in the same individual there is no doubt as to the result. Sometimes, however, they are divided. The physical control is acquired by an agent, the intention exists in the principal. When this occurs, the idea of Possession as being a mere Fact has been already given up; it is now a juridical relation, and its effects may be credited to one or another according to fixed rules of law. The change becomes very evident as we trace the doctrines of the Jurists upon the existence of intention in the principal. The question first arises in connection with a slave's peculium. If a slave acquires Possession *causa peculii*, need his master have immediate knowledge of it, and so form a present intention to possess? No, says Paul, for this is sufficiently implied in the original permission to the slave to have a peculium (D. 41, 2, 1, 5). It must be noticed, however, that this is an important extension of the early notion of Possession. It probably arose from the fact that it was often only technically distinguished from ownership, and as the permission to have a peculium carried with it the permission to transact all business matters in connection with it, it became necessary for the acquisition of Possession in this manner to be sanctioned. We are here, indeed, brought face to face with the guiding principle of the Roman jurists

in the construction of legal rules. There has been much controversy as to the real value of the Roman Law to the modern world, and some have said that in it we see the great masters at work in the formation of law, and that the importance of studying their method continues, though the work itself may now be valueless. Such an example we have in the present case. The above opinion is that of Paul, and was given when the matter was quite settled, and a good reason, founded on the general consent of the owner, had been found for it. In the time of Papinian, however, this apparently had not been thought of, yet he arrives at precisely the same conclusion (D. 41, 2, 44, 1). And why? Because, eager as were the Roman Jurists to deduce all their conclusions in strict accordance with principle, yet they never pushed this too far. Papinian knew well enough that Possession ought to be acquired by the slave *causa peculii* without any direct interposition of the owner, and so he forbore to put any hindrance in the way, but allowed it *utilitatis causa.* "*Dixi utilitatis causa jure singulari receptum, ne cogerentur domini per momenta species et causas peculiorum inquirere*" (*ibid.*) The sagacity of the elder Jurist is justified when at a later date Paul no longer sees here a case of *jus singulare*, but is able to bring it under a more definite rule. This, indeed, as I have already pointed out, should be the method of all law; first the formation of a rule; then the discovery of the *jus singulare* for a particular and important class of cases; and lastly the subsequent discovery of a broader basis for the

original rule, so as to include the *jus singulare* in it. The point for practical consideration is whether the special class of cases is worthy of this departure from the original rule. It is, moreover, obvious that in the case under consideration the master's Possession is no longer a Fact, but a mere matter of Law, and hence the Law refuses to reckon it to him unless it can approve the original acquisition by the slave. Thus, where the slave's possession is grounded on fraud or violence, it does not avail for the master (D. 41, 2; Javolenus, 24).

The same rule applies also to a son's peculium, but the juridical relation of Possession receives here a further development. The acquisition by the father is grounded not on ownership, but on the *potestas*, and it occurs even when the father is ignorant that the *potestas* exists (41, 2; Ulpian, 4). Hence there is another extension of the rule. The father has no intention as to the son's peculium at all, and thus an intention cannot be implied for each particular acquisition. But in this case the intention that cannot be implied from the facts of the case is implied from custom. The slave's peculium is reckoned a matter of favour; hence the master's intention that he should hold it must really exist: the son's peculium is a matter of custom; hence an intention on the part of the father that he should hold it can be implied even when it does not exist. So far the course of development is clear. The rule first requires an actual intention on the part of the principal: then this is supplied in the case of a slave from the permission

actually granted to him to hold the peculium; in the next place it is implied in the case of a son's peculium from the fact that such permission is usually granted; in this case, then, both the general intention and the special intention are alike implied. But the presumption of law having gone so far, a final step is now taken which at once severs the connection between Possession and Fact, and leaves Possession as a purely juridical idea. So far, if an intention has been implied, it has at least been implied where it can exist; now it is implied where such actual existence is impossible, for this is certainly the case when the owner of the slave is an infant or a madman (41, 2; Paul, 1, 5; 32, 2). Thus we have now reached a stage in the development of the doctrine as to the acquisition of Possession by means of another, in which the existence of an intention in the principal is clearly not necessary, and this relaxation of the rule being once established, it is useful for other cases also. Thus it had been held that a corporation could not acquire for want of intention (41, 2; Paul, 1, 22). But if a slave can acquire for a madman, so surely he can also acquire for a corporation. A way was thus presented of solving this difficulty without resorting to a *jus singulare*. It was, indeed, objected that the corporation could not possess the slave himself to start with, but this apparently was overruled.

But the doctrine has yet a further step to take. The corporation at least consists of persons, though it has no individual will. Not so with an *hereditas jacens*. This is a person only by a mere fiction, and

can certainly be credited with no intention of any kind whatever. Papinian, however, permits a slave to acquire for the inheritance (41, 3, 44, 3), though his opinion is not quite settled (41, 3, 45), and he bases it upon the admission of a *jus singulare;* but we have already seen that the doctrine on this subject was not fully developed in his time.

I have been led to give the above example at some length, because it shows in a very clear way the manner in which the Roman jurists did their work. They start from the strict rule that in every case a distinct intention to possess must exist on the part of the principal, yet they adapt it in such a manner to successive cases that the express intention not only vanishes entirely, but acquisition of Possession is permitted where it cannot possibly exist. The whole matter forms one of the most remarkable cases we have of the gradual regulation of Rights by Jurisprudence.

We are now in a position to consider the results at which we have arrived. We originally selected the Roman State as affording us the best instance of the rise and development of Law, unaffected by external circumstances, and we have seen that it is born in the midst of a natural harmony which precedes Law as we understand it, and which makes its origin and growth possible. Hence Private Law presupposes the existence of private Rights existing by the will of the owner and with the assent of the community. To these Rights, thus existing of themselves, there are then gradually added Protection and Regulation. The

Protection of Rights we have already examined. To make it efficient it is necessary that the force of the State should be at the disposal of those who have the immediate regulation of Rights in individual cases, and it is this regulation of Rights that brings us into the province of Jurisprudence. The Law originally is that which individuals usually do; it is custom properly so called. But this is only definitely determined when a disputed case comes for judgment. Immediately upon this Science comes into play, and these judgments are the material upon which it works. By observing them it tries to become conscious of fixed rules according to which they are given, and these rules it then expresses in words; so that, as Paul says, "regula est, quæ rem, quæ est, breviter enarrat" (50, 17, 1). It is here, indeed, that we seem to see the point of division between Science and Practice. Each has its proper department, and each reacts upon the other, but their spheres ought not to be confounded. Practice exists first in the judgments on particular cases. Science then steps in and commences to frame rules upon the results of practice. These rules are afterwards issued to the judges to guide them in their decisions; but though they may be decisive at the time, and though in the judges' hands they may be immutable, yet in the hands of the Jurists they are always in a state of progress, and the rule in its successive shapes strives to express the Law more correctly. It is in accordance with this that Paul says again, "non ut ex regula jus sumatur, sed ex jure, quod est, regula fiat." Hence,

as he proceeds to remark, following Sabinus, a rule is merely a conjecture as to the ground of decisions, and has no application after a mistake has been found in it.

Thus far the Law that we have been considering is Customary Law proper. The only desire of the judges is to decide according to usual practices; the only desire of the Jurists is to deduce rules from these judgments and to make the rules express more correctly the habits of everyday life. After a time, however, this plain method has to be abandoned. Legislation steps in and boldly alters old Rights or creates new ones; and Science asserts a claim to state rules of law not as they are but as they ought to be, and this, of course, is necessary.

In the conflict of interests which results from the growth of the State, there must be some ultimate authority upon the creation and alteration of Rights. But at first this authority acts with difficulty, and is only evoked upon great occasions. It delivers general orders, but all the details have to be worked out by the Jurists. At this point a peculiarity is visible in Roman legal history. The position of the Prætor produces a state of affairs quite unique. He stands on the borderland between Legislation and Science. We have, indeed, other Legislation in the form of laws passed by the Comitia; but to the Prætor are granted separate and exceptional powers. Moreover, he may be himself a Jurist, and is at any rate much influenced by them. We thus have in his edict a blending of Legislation proper and of Science. Ideally these two stand on a level, but proceed from different sources.

Statute Law comes direct from the State; Scientific Law comes from the Professors of a Science. In the Prætor the two meet and the union produces a quickening influence on each. But this can only be temporary. The Prætor is really equal to neither duty. He is not great enough to represent the State; he is not wise enough to represent a Science, and hence a fair distribution of work is not yet attained. Owing to the rapidity of Legislation produced by the Prætor's position, this method of making law becomes for a time unnecessary. Science must be called in to digest and arrange the material already collected. Hence we arrive at the golden age of Roman Jurisprudence, a time when Law occupied the highest position it has ever yet attained. But upon this subject it is impossible to add anything to what has been already said by Sir Henry Maine (*Ancient Law*, ch. ix.)

I have remarked that the Jurists, in course of time, claimed to put forward rules expressing the Law, not as it is but as it ought to be, and this, of course, was right. Custom can only exist where similar cases continually recur amongst the same people. But as Rights increase in complexity, there are cases which, though of frequent occurrence, are yet isolated from each other, and thus cut off from the influence of Custom. While, then, to the latest times, Customary Law proper may be made in accordance with the practices of special classes of the community, yet this becomes impossible as to the interests of the community as a whole. It is therefore essential that the Jurists should boldly map out a course of their own. Much

has been said of the vigour with which this was done by the Romans, and great influence has been ascribed to the manner in which they took the Law of Nature, as presented by Greek philosophy, for their guide. I have already suggested, however, that though some leading principles were borrowed from this source, yet in the more useful and humble parts of their work the Jurists were content to adopt the only principle which Law has ever really known, and to work not for the realisation of Natural Law but for the convenience of men. The actual records of the Roman Law show that at least a very considerable number of modifications in it were made "*utilitatis causa.*" For a time, then, Law at Rome was in the proper hands; it was moulded by the discoveries of Science.

But the separation between Legislation and Jurisprudence was now too complete. It was impossible to place the latter upon so sound a basis that all its professors should accept the same results as true, and till this is done its complete independence of the State can never be established. The result was already felt when the State intervened, and pointed out to the judges the manner in which the writings of the great Jurists were to be used. Thus a rescript of Hadrian made the opinions of certain Jurisconsults (*quibus permissum est jura condere*), when unanimous, binding on the judges. This, however, seems to be only a fair recognition by the State of the claims of Science. It is a law rather compelling the judges to observe its decrees than attempting to fetter it in its operations. Perhaps the next step was due to the decay of Science

itself. The greatness of Roman Law depends chiefly on that golden age of Jurists of which I have spoken. For its proper development to have gone on, that age must have continued. But it had the same fate as every period of creative genius. The Jurists came to an end. They had no successors who could carry on their work and harmonise their principles, and the decision of cases came to depend upon the number of opinions on one side and on the other that could be gathered from their writings. The next step taken by the State was in the right direction. If the old Jurists were to rule, they must speak for themselves. Now, Papinian had secured a distinct pre-eminence amongst these writers, but his opinions had been annotated by Paul, Ulpian, and Marcian. A law of Constantine (321 A.D.) withdrew all authority from these notes, but otherwise left the judges unfettered. Finally, about the year 420 A.D., it was found necessary to make the way still clearer. Five Jurisconsults only were to be consulted—Papinian, Paul, Gaius, Ulpian, and Modestinus. The writings of the rest are only worthy of attention if quoted by one of these. When they are at variance, the majority is to prevail; if they are equally divided, the opinion of Papinian is to prevail; if Papinian gives no opinion, the judge can choose whom he will follow.

This is a lamentable instance of what must happen when Science fails. If no new discoveries are made we must cleave blindly to the old writers, and truth lies in a majority of antiquated opinions. At this stage it was natural that a demand for a code should

be made, though this did not at first take the form which it finally adopted. The time of the great Jurists had been succeeded by an era of legislation, and this was the natural result of the centralisation of all civilised government at Rome. Even the position to which Law had there attained was not sufficient to release it from the effects of State control. This is but another instance of the old truth that all the best energies of human genius die away when they consent to produce their work at imperial bidding. The Jurists lost the free and independent position they had hitherto occupied, and instead of writing treatises of Law consented to draught imperial rescripts. The result is visible in the different estimations in which the Digest and the Code are held. The Digest represents the free efforts of Science, and is everywhere read and quoted. The Code contains only opinions uttered in the Emperor's name; its perusal is a matter of little interest; and where its conclusions are still valuable, they are so rather as illustrating the principles of the Digest than as creating any new principles of its own. A careful comparison of certain parts of the two works shows that the additions given by the Code are largely concerned with matters of merely arbitrary enactment, such as the priority of different classes or debts. A certain amount of interest attaches, of course, to an examination of these, but there is little trace of any definite principle, and the distinctions are rather the mark of superficial legislation than of sound legal sense. It must not be forgotten that, great as was the position which Science had attained, it was unable

to keep it, and its history should rather serve as a warning against the snares into which it fell, than as a model to be followed. At Rome the Science of Jurisprudence became extinct as it passed under State influence; perhaps it will only rise to consideration among us as it shakes itself free from that influence.

The activity of Legislation which marked the later empire is, of course, not to be deprecated altogether. New institutions were arising which were proper for such regulation. Thus the Code rightly contains important provisions upon the position of the *colonus*—the farmer who had succeeded the slave in the cultivation of the soil; and on the tenure by *emphytensis*, which was always becoming more important. The matter for regret, however, is that the spread of Legislation was coincident with the decline of Jurisprudence. Hence when, amid the multiplicity of laws, a demand for reform arose, this was confined at first to a collection of the imperial legislation. This demand was satisfied successively by the Gregorian, the Hermogenian, and the Theodosian Codes. Theodosius, indeed, saw that his work was incomplete so long as the doctrines of the old Jurists were not included in it, but his project for a vaster undertaking was never carried out. A hundred years elapsed before this was done by Justinian. Upon the result of his work I need say little. Valuable as it is, and great as its influence has been, it has been truly remarked that it is a lasting example of what a Code ought not to be. It is a record of the best times of Roman Jurisprudence, succeeded by an era in which Jurisprudence

was dead and Legislation had usurped its place. Had it still existed, its work of arranging and of harmonising the Law would have gone on; its principles might have been established upon a basis strong enough to resist State interference; and if in this state of things a Code had still been called for, it would have been produced from the midst of a School, not compiled at the bidding of an Emperor.

In brief we owe the greatness of Roman Law not more to the genius of the people than to the fact that it was so long developed without interference from the State. The course which events subsequently took has had the greatest influence on modern Law. At Rome, as we have seen, it grew up independently, and only gradually fell under State control; but when this change in its position was effected, the Roman Empire had spread itself over the world. This Empire, then, with its external apparatus of force, was at first all that survived, so far as anything could survive, amid the anarchy of the barbarian invasions; and as we emerge into modern times we have the reverse picture of Law, struggling, as it revives, to free itself from the fetters which had been cast upon it; a struggle the success of which has largely depended in the past, as it will in the future, on the amount of recognition which has been bestowed upon the Roman Law itself.

CHAPTER XI.

MODERN THEORIES OF LAW.

We have now traced the development of Law through its successive stages. The first stage has been shown to have existed in the village communities of India. Of our modern legal conceptions only two existed in that stage, Law and Duty. But Law was by no means the command of a sovereign. It was ascertained simply by an observance of the customs of the community, and as these had probably been arrived at in the course of a natural adaptation to circumstances, perhaps we have here the closest resemblance to a Law of Nature which has yet been seen. The second stage is surmised to have existed in the earliest times of Rome. This introduces first the conception of Right as an individual privilege, and then the necessity for a Sanction. Private interests arise at first not by a Law, but by the will of the individual and with the assent of the community. In the regulation and transmission of these interests, or, as we may call them, Rights, custom gradually makes itself felt, and so when a disputed case arises, the arbitrator who is called in to decide it appeals first to custom, and if this fails he gives an opinion according to his own

sense of justice. But the gradual increase of the society, with the corresponding growth of disorder, makes it impossible any longer to do without a Sanction. For this purpose, the military organisation of the community is of great advantage, and the State adopts the duty of compelling contending parties to accept an arbitrator, and of seeing that his decision is carried out. We cannot quite exclude from this stage the rise of legislation, but it is convenient to reserve it for the next. Here, then, we still have Customary Law, with the Duties it imposes, and which fill nearly the whole life of the individual; but we have further the rise of private Rights, we have the institution of customs with regard to these, and we have the gradual accumulation of decided cases in which the judge's decision has rested merely on his sense of justice.

The third stage is characterised by the conscious regulation, creation, and alteration of Rights according to fixed rules, and this task is divided between the Science of Jurisprudence and the Sovereign Power. At first the Sovereign Power is only exerted on great occasions when the conflicting Rights of different parties have to be adjusted; the chief work is done by Science. The material which it at first uses consists of customs and decided cases; but it extends its means of improvement when it turns its eyes away from home and enquires into the laws of other nations. Its progress is still slow, however, until it learns to cast its looks neither behind nor around, but in front. The doctrine of a Law of Nature, which is to be the goal of Jurisprudence, makes

the lawyers ready for changes, and we have the free growth of rules of law according to principles of utility. In this stage, then, we have Legislation in full activity. At first, indeed, it works slowly while it is making the *jus strictum*. It is necessary to lay the foundations surely that they may bear the superstructure that is to be raised upon them. Then a bolder spirit is displayed, when rules of equity are brought in to mitigate the rigour of the strict law and make its application to real life tolerable. Finally, the spirit of innovation bursts its bonds. The old rules are freely sacrificed, and an attempt is made to establish the fabric of law on a sounder basis. There the process comes to an end. What Science might have done at this point, had it survived so long, we cannot tell, but Law had for many years fallen more and more under the Sovereign Power. At the end of this stage, then, the Austinian cycle of ideas is complete. The Sovereign issues Laws; he thereby imposes Duties and creates Rights; and he enforces them with a Sanction. I have already referred to the opinion of Sir Henry Maine, that this represents the goal towards which all civilised communities are tending; I shall now, therefore, resume the task of enquiring what other explanations have been given of the theory of Law, and how it may be possible to reconcile these with that of Austin. In doing this I shall consider in some detail the views of the great German jurist, Savigny, and of others who may be said to belong to his school. It will be convenient to class these together as belonging to the school of German

Jurisprudence. Of recent years, however, one distinguished jurist has advanced views which closely resemble those of Austin, and we may find in some of the utterances of von Ihering confirmation of Sir Henry Maine's opinion. It will, perhaps, be not improper to consider these in connection with Austin's system, and we may thus conveniently speak of the English and German schools of Jurisprudence. We can state in a few words the points of difference between them; these refer chiefly to the source of Law, to its sanction, to its relation to Morality, and to the test to which it must conform.

1. With regard to the source of Law.

The English School admits only the Sovereign to this position, though the legislative power may be used either directly by the Sovereign or indirectly by his subordinates, and though it may take the form of direct (Statute) or oblique (Judiciary) legislation; the German School, on the other hand, looks for the primary source of Law in the customs of the people, and, as interests multiply and become more complex, in the Jurists who then come to represent the people; direct legislation by the State is added at a later time to reconcile conflicting interests and to facilitate the transition from one custom to another.

2. With regard to the Sanction of Law.

The English School lays great stress on this, regarding it as a constituent element in Law—the ultimate basis, indeed, on which it rests; the German School admits of course its necessity for the realisation

of Law, but relegates it to a subordinate position and contemplates at least an ideal possibility of Law existing without it. The real support of Law it finds in the moral approbation of the people.

3. With regard to the relation of Law to Morality.

The English School regards these as perfectly distinct, and its employment of the ideas of Sovereign and Sanction in the definition of Law makes this distinction very clear. The German School contemplates no such sharp line between the two; Law exists not in separation from Morality, but as supplementing it and making it possible.

4. With regard to the test to which Law should conform.

The English School here adopts the principle of Utility as enunciated by Bentham; the German School, although it has not adopted this in so many words, yet arrives at the same end by contemplating the community as a Whole, in which a reconciliation has to be effected between the interests of individuals considered separately, and the interests of the Whole considered as a community.

Of these different points, the most important are certainly the first two, dealing as they do with the source of Law and the means on which it relies for its existence. I have already given certain reasons in order to account for the different ideas that prevail on these subjects; it will now be convenient to allude to these more fully, and then we shall be in a position to proceed to the details of the two systems. Before

doing this, however, it will be well to add a word in explanation of the terms I have used above. I do not, of course, mean to imply that the theory of Law which bases it on the consent of the people has universally prevailed in Germany, or that that which bases it on the superior force of the Sovereign is peculiar to England. The former, indeed, belongs specially to modern Germany, and though it is bound up with the names of Savigny and Puchta, yet its real author was, I believe, Hegel. The latter was prevalent in Germany in the last century, and can boast of the name of Kant. Hobbes, however, in England, and Spinoza abroad, are its proper originators, and it was to the material thus supplied that Austin applied his wonderful powers of analysis. I use the above terms, then, rather for convenience of reference than because of their exactness, and this explanation will be sufficient to prevent any error arising therefrom.

There were two great legacies which Rome bequeathed to the mediæval world. One was the pattern of centralised government; the other the Law which she had elaborated in the course of a thousand years. These legacies were not designed for one people only, but for the world at large, and their effect on the two countries we are considering was curious. Of the two each received only one immediately; the other was left till they should realise its value and make an effort to obtain it. By a course of events, only remotely indeed connected with Roman influence, England obtained a firm centralised government

sooner than any other nation, but at the same time she conceived a strong antipathy to Rome, and refused to participate, openly at least, in the other great benefit she had given to the world. Germany, on the other hand, though she seemed to be the direct heir of the Roman empire, received this only in name. The reality which she did receive was something quite different; it came not in the person and court of the Emperor, but in the Digest of Justinian. Of the two legacies, then, which Rome bequeathed, we may say in brief that England received immediately Empire, but no Law, and Germany received Law, but no Empire.

We find, therefore, a completely different state of things in the two nations. In England we start with a strong centralised government and trace the growth of Law. It is inevitable that under such circumstances it should appear to proceed directly from the Sovereign. To such an extent is this the case that even the existence of Customary Law is denied, and we are told that this is a mere fiction by which judges impose their own law on the nation. The idea, then, that the State is directly or indirectly the source of all Law governs our whole Jurisprudence. Upon this the analysis of Austin is founded, and the discovery of Sir Henry Maine that it is not applicable to all races at all times is at first felt by the student of Law to be a puzzling anomaly.

In Germany, on the other hand, the course of affairs is quite different, and the central point in this difference is the open introduction of the Roman Law.

This has been well described as a part of the general return to the wisdom and learning of antiquity which succeeded the confusion and barbarism of early mediæval times. In Italy it had remained in force, nominally at least, till the twelfth century, but at this time attention was again called to it by Irnerius and the school which he founded at Bologna. It made its way into Germany only gradually, and the main reason of its progress was the fascination it exercised upon the minds of Jurists. Attempts have been made to assign its promulgation as law to a decree of the Emperor Lothair, and to a judgment of the Imperial Court of Justice in 1495: the former, however, is probably a fable, and the latter assumes the existence of the Law and does not introduce it. In the words of Puchta, "it was not through any external power, but by the force of scientific conviction, that the Roman Law, just like the philosophy of the Greeks and the masterpieces of the old world in general, found entrance and new life."[1] It is not to be denied, however, that it derived a certain amount of assistance from the idea that in Germany the ancient Roman Empire was being continued. But though it was supported in this twofold manner, we must not suppose that it effected an easy entrance: there was no failure of those who defended the existing German law, and it was not till the middle of the sixteenth century that it secured full recognition.

I have said that this recognition was due to the

[1] *Pandektenrecht*, p. 1.

sense the Jurists had of the inherent excellence of the Roman Law, and this has been given as an example of the creation of Customary Law by the Jurists as representatives of the people. Few questions, however, have given rise to such keen contests in recent years, and this, by reason of the difficulty of reconciling the existence of the Roman Law in Germany with the cardinal principle of the historical school of Law which Savigny founded, the principle, viz., that the Law is the outcome of all the past circumstances of the people. Now nothing can be clearer than that the Roman Law existed in Germany as a foreign body of Law; it therefore could not be Customary Law in the original sense, that is, as being practised by the people. But then, it is said, the Jurists represent the people in matters of Law, and they adopted the Roman Law to supply natural wants. The answer to this is obvious, that the Jurists themselves did not know in all its details the Law which they were importing, but accepted it as a whole. The fact is, as Windscheid remarks, that they "were under the influence of an intellectual current which strongly prevailed in their time, the irresistible return to the ancient culture, the glamour of which dazzled their eyes."[1] The same influence was at work in England also, but here the judges were the only Jurists, and they borrowed from the Roman Law secretly; in Germany the Jurists existed as a distinct class, and they adopted the Roman Law openly. All that mine of legal wealth was too valuable to be neglected when

[1] *Pandektenrecht*, i. 26, note.

rules of law had to be formed for new nations; but in England it was concealed under the fiction of Customary Law as declared by the Judges, in Germany it contributed to the formation of the idea of the independence of Law, which has characterised the modern Jurisprudence of that country.

The above considerations seem to give us a clue to the difference that exists between the abstract conceptions which lie at the root of English and German Jurisprudence. The English Jurist regards Law as the creature of the Sovereign, and lays stress upon the Sanction by which it is enforced. If it is objected that many rules are certainly not laws made by the Sovereign, he replies that they exist by his sufferance and that this is equivalent. Such a barefaced fiction as this could only have passed current with a people whose legal ideas dwell in a realm of fiction. It is perfectly clear that but a small portion of private law in the past has been created by the Sovereign; the rest has been due to Custom and to such legal Science, assisted by Roman Law, as England has happened to possess. But in Germany these distinct sources have long been recognised. The customs of the country were never so rudely dealt with as many of those which obtained in England before the Conquest, while the acceptance of the entire Roman Law, and the fact that this was made the basis of legal study, gave to the rules established by the Jurists a value quite independent of any authority derived from a Sovereign power. Hence the German Jurist lays no great stress upon

the State in his ultimate conception of Law, and he discards the idea that a Sanction makes any necessary part of it. The idea from which English Jurisprudence starts is, that Law is intended to restrain a refractory people. Hence the necessity for a Sovereign to impose it, and for physical force to ensure obedience to it. German Jurisprudence, on the other hand, starts from the idea that Law exists only to ensure the due liberty of the individual; from the customs of the individuals it originally springs, and as they obey it willingly, a Sanction is no essential feature in it, but merely an occasional necessity. This position may seem anomalous to those who compare the actual liberty enjoyed by the German with that enjoyed by the English citizen; but it must be remembered that we are now contrasting the abstract conceptions of different philosophers, and that these may not correspond exactly to the facts of life. There were special reasons which made Austin place the idea of sovereignty at the base of his theory of Law, in exactly the same way as there were special reasons which induced Savigny to prefer the idea of individual liberty. Austin was influenced very largely by the political writings of Hobbes, and Hobbes, with the spectacle of civil strife before his eyes, was anxious above all things to find somewhere a strong restraining power, even though he should incur the reproach of upholding despotism. Moreover, Austin wrote at a time when England was in need of vast legislative reforms, when there was no school of Jurisprudence which could take any share in the work,

and when full confidence was placed in the power and wisdom of Parliament as a legislative assembly. It is not wonderful, then, that he should have adopted Sovereignty as his ultimate idea, and have hoped to build on this a science of Jurisprudence sufficient to meet the wants of men. Savigny, on the other hand, wrote in an age which was longing to give expression to national union, and he took his stand upon the principle of nationality. Law was, in the first place, the outcome of the customs of a people sprung from the same stock and possessing the same feelings and ideas. They practised the same customs as naturally as they spoke the same language, and Law was at first merely the expression of this. Then, when this national unity found expression in the formation of the State, it was possible for the next step to be taken. The common will of the people is now expressed by Legislation. Finally, Science takes up the work when the complexity of affairs renders necessary a division of labour, and not only arranges and expresses the existing law, but in several ways it is influential in making new law also. Each of these systems is of course only an abstraction, and it is for us to consider which of them represents most nearly the facts of life, or which will have the best influence upon the future development of Law; it is not improbable, indeed, that each contains valuable elements of truth, and we may, perhaps, find some means of availing ourselves of these without becoming bound to the acceptance of either system in its entirety.

CHAPTER XII.

THE MODERN GERMAN SCHOOL OF JURISPRUDENCE.

THE general distinction that is always apparent when we compare the ordinary German with the ordinary English Jurisprudence is, that the former leans towards an ideal view of Law, the latter to a strictly real view; in reading German works we see a system unfolded which would be perfect could it only be realised, while in English works we are continually reminded of the slow pace at which Law really follows after the wants of men. Thus to the German the only distinction between Law and Morality is, that the former springs from and supplements the latter; while to the Englishman the continual difference between the two in actual life leads him to characterise each by distinctive marks. It is true that even the German recognises the fact that this discrepancy exists; but he either says enigmatically, like Savigny, "that this implies no contradiction,"[1] or more intelligibly like Trendelenburg, that it is useful to hold to the idea of their proper relation on account of "the power of improvement and

[1] *System des heutigen Römischen Rechts*, sec. 52. Most of the following extracts are taken from the French version.

rectification which it contains in itself."[1] In this phrase, indeed, we have the key to the whole difference. In no case can our idea correspond absolutely to the facts of life; but the German chooses such an abstraction as shall tend gradually to improve the facts, the Englishman is contented if his abstraction correspond at least to some of the facts as they are. The former, we may say, chooses his ideal in the hope that the facts may come up to it, the latter resolves to make an approximation to existing facts, and is content to alter it as the facts change. Thus to the German, Law is a supplement to Morality, and does not necessarily imply the idea of Force; to the Englishman, Law is distinct from Morality, and bases its claims upon Force solely. In considering, then, the following views of German writers, it will be necessary to keep this distinction continually before us.

The point of divergence between what we have called the German and the English schools of Jurisprudence, is to be found in the fact that the former regards Law as a Rule, the latter regards it as a Command. This may seem strange to readers who have been accustomed only to Austin's analysis, but nothing can be clearer than the fact that this distinction does exist. I shall proceed, therefore, to consider the nature of the Jurisprudence which is developed from the former idea.

It must be remembered that German lawyers, basing their system so entirely on the Roman Law, have had their attention largely confined to private

[1] *Naturrecht*, p. 93.

legal relations; hence they derive their notions of Law from the private Rights thence arising, rather than from the Duties which are imposed by the State. Thus Savigny starts from the idea of a Right as being "a power of the individual. Within the limits of this power the will of the individual reigns, and reigns with the consent of all."[1] But inasmuch as society consists of a number of such individuals, each endowed with a will of his own, it is necessary to draw a line round the province of activity of each, in order that the will of the individual in question may not pass outside this, or the wills of others intrude within it. Hence we have the metaphor by which Savigny illustrates the nature of Law.

> The external world, that is to say the medium in which man exists, touches him at a thousand points of contact; but the most important are his relations with the beings who have the same nature and the same destiny as himself. In order that free creatures, thus placed in the presence of each other, may mutually aid and never impede each other in their development, it is necessary that an invisible line of demarcation should define the limits within which the existence and activity of each may find independence and security. The rule which fixes these limits and guarantees this independence is called Law.[2]

Law is thus compared to an invisible line of demarcation between the provinces of the wills of different individuals. The domain appertaining to each represents the collection of his Rights, and in this way the German distinguishes between the two meanings of the word *Recht*. This province in which the will of the individual reigns represents *Recht* in the subject-

[1] *System*, sec. 4. [2] *Ibid.* sec. 52.

ive sense; the line which surrounds the province, and erects a barrier against the intrusion of other wills, is *Recht* in the objective sense.

We arrive at the same idea, too, in another way. A person may exercise his Rights for a long time without thinking of their legal aspect because they are not disputed, for "a Right is never manifested more clearly than when, being denied or attacked, the judicial authority intervenes to recognise its existence and its extent."[1] But when we come to consider how we are to form a judgment upon the matter, we find that we must not regard the Right itself in the first place, but rather that legal relation between the parties of which this Right may be only one particular aspect. The introduction of this idea of a legal relation (*Rechtsverhältniss*) tends at first to import a little difficulty into the matter, but further reflection shows that it is a point of slight importance, and is chiefly useful as helping us to a convenient division of the Civil Law. Thus, when Savigny says that a more attentive examination shows us that the logical form of a judgment is merely an accidental part of the matter, and that its substance "is only true and reasonable so far as it is derived from a complete view of the legal relation,"[2] he merely means that no judgment will be correct which does not take into account all the circumstances of the case. The manner in which he introduces this idea seems to imply that great importance is to be attached to it, but I cannot find that it has any further meaning than that just given. In the course of the

[1] *System*, sec. 4.

[2] *Ibid.* sec. 4.

work, indeed, we see that the idea of a legal relation is useful as leading to certain fundamental divisions in the treatment of the Law, but with this, as I have just remarked, its function is at an end. The idea itself is, indeed, so unsettled that German writers are divided as to its meaning, and opinions differ as to whether it is to denote relations between men and things, or is to be confined to relations between men only, and in this latter case whether it includes relations between juridical persons. It is enough to remember that by considering the relations in which men stand to each other, or to the world around them, we can discover the possible ways in which their wills can be exercised, and can thus mark off all the possible kinds of Rights. For this purpose the idea of a legal relation is of practical use, but for no other.

When then a particular Right has been attacked, we can only form a judgment upon it by bringing the case within a general rule. "This rule is called Law . . . It is manifested especially in a Statute, that is to say, in a rule promulgated by the supreme power in the State."[1]

According to Savigny, then, in considering any question of law we take the individual as our centre. The province of his activity, or the province of his Rights, is everywhere in contact with the provinces of other men. Whenever such a point of contact occurs, we may say there is a relation between the individuals, and if it happens to be governed by a rule of law, it

[1] *System*, sec. 5.

is a legal one. These two ideas, indeed, go to make up the one idea of such a relation. Thus every legal relation appears to us as a relation of one person to another determined by a rule of law, and this determining rule assigns to each individual a domain in which his will reigns independently of every other will. Hence every legal relation is composed of two elements—1st, a given matter, that is to say, the relation itself; 2d, the idea of law, which regulates this relation.[1]

Every relation in question, then, is governed by a rule, and Law in general, regarded as a whole, is the collection of such rules. It exists primarily for the individual, and it draws a line around him in order to protect the domain of his will against intrusion on the part of others.

There are, however, strong reasons which make this view of Law inadmissible. We may, indeed, begin with the individual, and by adding these together finally arrive at the Whole, or the Community; but it is more convenient to start from the Community; to treat of this first, and then come to consider the Rights of individuals. As I have before said, Savigny's system is a convenient one for the exposition of private law, but is not sufficient for the explanation of Law as a whole. For the necessary correction we may refer to the work of Trendelenburg.[2] So far as it at present concerns us, we may say that he lays stress upon the fact that the individual only exists as a member of the Whole, and that it is by considering the objects

[1] *System*, sec. 52. [2] *Naturrecht auf dem Grunde der Ethik*, 1868.

and destiny of the Whole that we must frame rules for the guidance of the individual. It is indeed with reference to this Whole that he defines Law—calling it, however, since it consists of persons whose wills can be influenced by motives, the Moral Whole. Thus he says that "Law is, in the Moral Whole, the collection of those Rules of action by which it happens that the Moral Whole, with its association of members, can be maintained and further developed."[1] Of course to an English reader this definition of Law appears to contain at once too much and too little: too much, because it contains a test to which Law ought to conform; and too little, because it says nothing of the source or the realisation of Law. But, without dwelling upon these matters, it is enough to point out that here, too, Law is defined as a rule, though in a somewhat different sense to that in which Savigny uses the word. Savigny's rule of law is a rule by which a judge must decide a case; Trendelenburg's rule of law is one by which the individual must regulate his actions. It is true that the latter recognises that this may have to take the form of a command; thus he says that laws are nothing if they do not possess the power of the Whole for the purpose of realisation—that is, if they cannot be put in the form of a command.[2] But he is careful to point out that this should not be incorporated in the idea of Law itself, but should be left to be drawn from it by way of necessary deduction. The one thing which we have to notice is, that the fundamental notion of Law here presented to us is that of a rule

[1] *Naturrecht*, p. 83. [2] *Ibid.* p. 78.

which, in the complex relations of society, is required to regulate the actions of the individual members.

The next matter, then, which we have to investigate, concerns the origin of these rules; and this will lead us to consider the sources of Law, a matter upon which German Jurisprudence differs widely from English. If we define Law as a command, we at once introduce the idea of a Sovereign, and we can admit no law which does not proceed from him. But if we define Law as a rule existing for the purpose of regulating the actions of the individual in the interests of the Whole, though it may be necessary to form a power for issuing and enforcing it—in other words, to erect a State, yet this is only as a means to an end. The original source of Law is that Whole for which it exists; hence, if the people as a Whole can in any way frame general rules of action, these will exist as good, and, indeed, as the best possible examples of Law. Hence we arrive at Savigny's view that the people themselves are the original sources of Law, and that Legislation is only introduced when Custom becomes inadequate to regulate the increasing needs of society.

The principle of utility requires that the actions of men should be so regulated as to produce the largest possible amount of pleasure, and to spread the enjoyment of it over the largest possible number of people. It has been pointed out, moreover, that as the wants of the individual are to him the best test of the pleasure he desires, this principle is, as a rule, most completely carried out when each person is allowed to

satisfy his own wants in his own way. But when a number of people have the same wants, and when they know of only the same way of satisfying them, they will naturally perform the same actions in the attempt so to do. This seems to be the origin of Customary Law, and it is practically from this point that Savigny starts. At the very beginning of human history we find the acts of men displaying a certain uniformity: they all do certain things and abstain from doing other things. We can only say, as we have done above, that they arrive at this process by means of an unconscious adaptation to surrounding circumstances. Of course I do not mean to use the word *unconscious* in a very strict manner. Men have always been guided by reason more or less. Thus if we enquire what was the origin of the three-field system in agriculture, we can only surmise that it was the suggestion of some individual more sagacious than his fellows, and who had also sufficient influence to have it generally tried. This spontaneous adoption of a certain method is, indeed, of the very essence of a custom, and our first outlook upon mankind shows them to us as in a very large measure ruled by custom. It is the central point of Savigny's doctrine that these customs are the result neither of chance nor of an individual will. "Positive law springs from that general spirit which animates all the members of a nation, and the unity of the Law is revealed necessarily to their consciences, and is by no means the effect of chance."[1] There is a vagueness in the phrase "unity of the Law" which we need not

[1] *System*, sec. 7.

here enquire into, but the use of the word "necessarily" shows that the growth of rules of law of this kind identifies them with rules of morality. So, too, when we read of "the unanimous recognition of positive law, the feeling of necessity which accompanies its manifestations, a feeling so clearly expressed by the ancient belief which attributes to Law a divine origin."[1] It is, indeed, this character of necessity that attaches to early rules of law, which makes it impossible to separate them from rules of morality. As an illustration of the natural growth of certain practices, Savigny cites the development of Language, to which I have adverted on a former occasion:—

> It is neither chance nor the will of individuals, it is the national spirit which gives birth to language; but its sensible nature renders its origin more easily perceived and understood than in the case of Law. These different manifestations of the general spirit of a people are so many characteristic marks of its individuality, among which language holds the first place as being the most apparent.[2]

Law, however, has its tangible aspect also. This is apparent in those symbolical actions which in early times are used to express and to be a record of intentions. Thus the main features of the mancipation are probably anterior to Law as such, and have their origin in the spontaneous customs of the people. The actions of men, then, are, in the first place, guided entirely by these customs; when a field is to be tilled, or a sale to be made, there is not the slightest doubt as to how this ought to be done: or should a doubt momentarily arise, it will be at once settled by a reference to uni-

[1] *System*, sec. 7. [2] *Ibid.*

versal practices. Thus a person guides his conduct by direct reference to the acts of his ancestors and neighbours, and has no necessity for a rule. This is what Savigny means when he says:—

> Law, which lives in the common consciousness of the people, is not composed of abstract rules. It exists rather in the actual perception of a legal institute in its organic connection, and the rule appears in its logical form so soon as the need for it is felt; it is then singled out from this connection, and is translated in an artificial manner.[1]

The real process which seems to be hinted at here is probably the following:—The mind of the individual is gradually filled with recollections of the practices which he sees going on around him. He continually sees the same class of actions performed in the same way. Hence, when he himself comes to have to perform similar actions, he has no hesitation as to the way in which he ought to do so. The natural horror of discontinuity which governs the whole moral nature of man, and upon which the feeling known as conscience is perhaps founded, induces him to conform his actions to the pattern which he has in his mind. When Savigny says, then, that Law lives in the conscience of the people before it is composed of abstract rules, he means, apparently, that each individual has a sufficient number of recollections to serve him as models for all his actions, and that the necessity for a rule is first felt when such recollections are wanting.

We have further to notice the effect which time has upon Law. This produces two opposite ten-

[1] *System*, sec. 7.

dencies. Considered merely in itself, it has a tendency to intensify an idea of law whether existing merely as a custom or formulated as a rule. Such an idea, once received among a people, roots itself deeper every day; it gathers strength every day, and the consciousness of law, which at first existed only in germ, gradually takes a determinate form.[1]

But time, considered in relation to the fact that it produces a change of circumstances, has a tendency to modify the law. The question, then, is how these two tendencies are to be reconciled. In the infancy of a nation this is done by a gradual change of custom, but later on other means have to be provided, and these are afforded by Legislation and legal Science. It is only during the plastic condition of the nation that Law naturally adapts itself to circumstances; this adaptation must afterwards be effected by conscious effort. This is what I have elsewhere called the change from unconscious to conscious adaptation. The main reason why this unconscious adaptation becomes impossible, is to be found in the increasing complication and conflict of different interests. The following passage well describes this:—

> It is especially during the infancy of a people that this element (*i.e.* the natural development of law) acts with most force and liberty; for then the bond which unites the nation is stronger and more generally felt, and the difference of individual developments does not obscure the consciousness of this feeling. But as these developments grow to be more unequal, and come into more frequent collision with each other; as special pursuits and occupations produce greater isolation in the conditions of

[1] *System*, sec. 7.

individuals; so also the law, which has its source in the general mind of the nation, is developed with more difficulty, and this kind of development would cease altogether, did not new circumstances create for it new organs in Legislation and legal Science.[1]

The office thus assigned to Legislation and Science is to bring about those changes which the spirit of the people, or more familiarly public opinion, demands. The Law which they produce, therefore, rests on the same ultimate basis as Law produced by Custom.

This is a short sketch of the origin of Law, as conceived by Savigny and Puchta; and it has been identified with the historical school of German Jurisprudence. A sharp attack has been made on it in recent years by Ihering in his *Struggle for Law*,[2] and he has objected especially to the idea that Law has been formed, like language, unconsciously and painlessly. Thus he says, "every principle of Law which obtains had first to be wrung by force from those who denied it."[3] The central point, indeed, about which his doctrines group themselves is, that Law is only obtained by the gradual regulation of Force, and hence he is strongly opposed to the current ideas which, as we have seen, regard Law as a rule. Thus he says:—

Our theory of Law, it is only too easy to perceive, is busied much more with the scales than with the sword of Justice. The one-sidedness of the purely scientific standpoint from which it considers the Law, looking at it not so much as it really is as an idea of Force, but as it is logically, a system of abstract

[1] *System*, sec. 7.

[2] This has been translated by Mr. J. J. Lalor, of the Chicago Bar, 1879.

[3] P. 1.

legal principles, has, in my opinion, impressed on its whole way of viewing the Law a character not in harmony with the bitter reality.[1]

But it is clear that Ihering mixes up the different functions of Force, according as it may be used to make Law or to enforce Law. Confining ourselves to the former function, which is the only one with which we are concerned at present, we shall find that Ihering's theory is, in its turn, to a certain extent inconsistent with the probable truth. He would, indeed, discard Savigny's account of the origin of Law entirely, and he asserts that it is merely the result of importing into Jurisprudence the romantic ideas which prevailed early in the century in poetry.

That Law, or any principle of legal right, comes into existence, or is formed painlessly, without trouble, without action, like the vegetable creation, is a really romantic notion, that is, a notion based on a false idealisation of past conditions.[2]

From the recent information, however, which we have received as to the origin of Law, we may be inclined to demur to this wholesale condemnation of Savigny's theory. Truth, as is usually the case, will be found to lie between the two extremes. We need not dispute the fact that all changes in Law have to meet with a certain amount of resistance, and it may be impossible to overcome this resistance without a severe struggle; it is partly, indeed, for this reason that Legislation is introduced, in order to effect changes which it would be beyond the power of Custom to bring about. Thus Ihering is to a large

[1] *Struggle for Law*, p. 5. [2] *Ibid.* p. 15.

extent right when he says that "all thorough reforms of the mode of procedure, and of positive law, may be traced back to Legislation."[1] But when he brings forward, as an example, the power over debtors which existed in ancient Rome, and says that this could never have arisen without a severe struggle, we may well take exception. Of the probable origin of this right I have already given an account, and it seems likely that though its abolition cost severe struggles, yet its origin is to be found in the gradual growth of Custom. Indeed all the research of recent years seems to confirm Savigny's theory of the origin of Law, and Ihering's view merely serves to emphasise the fact that custom plays a less and less important part as the community expands, and the interests of different classes come into conflict. But Savigny, too, recognises this; and these, as we have seen, are the very reasons which he assigns for the introduction of Legislation and legal Science. Ihering's special attack is directed against the comparison of the growth of Law with the growth of Language; but it must be remembered that this is merely a comparison for the sake of illustration. The growth of Language is really unconscious, but the growth of Law cannot be entirely so. It is always, we may suppose, a matter for discussion and suggestion, and a custom arises when some one suggestion is generally acted upon. I have already tried to describe the state of society which is most favourable to the growth of Customary Law, and to this we may properly apply Savigny's theory.

[1] *Struggle for Law*, p. 9.

But when we come to that second state in which private interests arise, and in which classes stand opposed to each other, then we must largely abandon custom as a source of Law and turn to Legislation. Let me repeat then that Custom is the true source of Law so long as interests are identical and simple, but when, in a later stage, conflicting interests have to be reconciled, then we must have recourse to Legislation, and when complex interests have to be adjusted, then we must have recourse to Science.

As, then, Law springs from the wants and desires of the People, and as Legislation and Science merely exist for the purpose of reconciling and giving expression to these desires in the most convenient way, it is important to consider what we are to understand by the People; and, accordingly, Savigny next takes this point into consideration. We have seen that Law takes its rise in the common actions of individuals having the same interests; hence the People, which consists of the assemblage of these individuals, must be a society bound together by natural ties producing community of feelings and interests. The natural tie, as a rule, is a common descent, and its most conspicuous mark is the use of a common language. But, for practical purposes, it is necessary to determine the extent of a people much more exactly than this, and hence in the course of our enquiry we arrive at the State, the point from which Austin begins. It is instructive, however, to notice that in the writers to whom we are now referring, the expression State is used where Austin would use Sovereign. This, too,

is a consequence of the distinction between the two schools to which I have already alluded. If Law is a command, we must know from whom it proceeds, and to whom it is addressed. Hence we have the Sovereign and the Subjects, and these two together constitute the State. But if Law is a rule, introduced originally by the consent of all, we require, when this simple method of introduction is no longer sufficient, some organisation by which the wishes of all can be ascertained. This organisation it is which is called the State; it is simply the representative of the people, and is not held to denote any opposition like that between Sovereign and Subject. The account which Savigny gives of the origin of the State is in conformity with this idea.

If, now, we enquire what gives birth to the State, we find here, as for Law in general, a superior necessity, an internal force which tries to escape, and which impresses upon the State an individual character. This force produces the State as it produces Law, and we may even regard the realisation of the State as the highest act of its power.[1]

It is convenient to notice that upon the introduction of the idea of the State, we at once have a division of Law into Public Law and Private Law; the former regulates the State itself and the relations of individuals to the State; the latter is concerned with the relations of individuals amongst each other.

If, next, we consider what are the functions of the State with regard to Law, we find that these consist,

[1] *System*, sec. 9.

first in realising the Law, next in enforcing the Law, and finally, though to a less extent, in forming the Law. It realises the Law by means of its judicial power; it enforces the Law by means of its sanctioning power; and it makes Law by means of its legislative power. Of the former two functions I shall speak presently: we are here concerned only with the last.

We have thus seen that Law originally arises by Custom, but that when the wishes of the people can no longer be ascertained in this way, the State is formed as their representative, and that this, in its turn, is aided by legal Science. We may proceed, then, to enquire into the position which is to be assigned to each of these sources in the making of Law.

1. *Customary Law.*

Savigny first attacks a common error which occurs in the use of this expression, and which is calculated to give a false idea of it. Thus, it may be supposed that a custom arose from an arbitrary decision in some particular case, and from the repetition of the same decision in subsequent cases through disinclination to go through the trouble of forming a fresh opinion. But this is to mistake the basis upon which Customary Law rests. It has "its existence and its reality in the consciousness of the people."[1] It is merely because this consciousness cannot be directly perceived that we are driven to recognise the law "by those external acts which manifest it,—by usages, by manners, and by customs."

[1] *System*, sec. 12.

A series of uniform acts betrays a common source, the belief of the people, and nothing is more removed from chance or mere arbitrariness. Thus, then, custom does not produce positive law, it is merely the sign by which we recognise it.[1]

It has been naturally objected to this, however, that the realisation of Custom in actual practice is quite as necessary for its validity as Law as the promulgation of a Statute by the Sovereign, for indeed in this way only can it be known. And yet the existence of the Statute depends not on the promulgation only, but also on the power of the Sovereign to enforce it. Similarly, on this other theory of Law, its existence depends not only on the practice of the custom, but on the conviction of the people that this custom is the Law. The two points are reconciled by Windscheid when he says that "in the practice of the custom is the conviction of the people apparent that what they do is Law, and in this conviction lies its binding force as Customary Law."[2]

Savigny, however, is aiming at a real distinction, which is based upon the effect that the mere practice has in forming the custom. Thus, he says that there are two senses in which mere custom as such may be said to have an effect upon the formation of positive law. In the first place, there are some principles which are firmly established in the belief of the people, others which are but slightly realised; while, then, the former have a substantial existence of their own, and merely require external acts for their expression, the latter can hardly be said to exist at all

[1] *System*, sec. 12. [2] *Pandektenrecht*, sec. 15.

unless they are displayed occasionally in outward act. Thus, "in order to have a clear and distinct consciousness of these principles, the people themselves must see them often applied, and this necessity makes itself the more felt with a people as the creative force of law is developed among them with less and less energy."[1] In the second place, there are certain parts of positive law which must necessarily be left to a mere arbitrary decision: when we want to fix the number of years for prescription, we cannot say that one number rather than another recommends itself to the general wish. There is a tendency, then, in such a case as this to select some one number in the first instance, and follow it afterwards merely for the sake of consistency.

In such cases our previous judgments and decisions become authorities for us, and in this sense custom is one of the elements of law: here we have the operation of the rule of continuity in opinions, in acts, and in circumstances, a rule which still exercises a great effect upon various matters of law.[2]

Custom, therefore, is always a sign of positive law, and is sometimes an element in its formation. This being recognised, there are two ways in which its existence is made prominent; by symbolical acts, and by judgments on decided cases. The one constitutes the pictorial apparatus by which a people impress their customs on their own mind: the others are decisive opinions upon the existence of custom, arrived at by persons having full opportunity for enquiring into it. But though a Right, when thus decided on

[1] *System*, sec. 12. [2] *Ibid.*

and applied, assumes a certainty it may have wanted before, yet it can do so only in the eyes of outsiders. To the people themselves Custom exists as Law quite independently of any application of it. "It is a reality of which they are directly conscious."[1]

2. *Legislation.*

So far Savigny has regarded Law as springing solely from the wants of the people, and as decided spontaneously by these wants. In advancing now to Law as settled by Legislation he does not leave this position, but he founds the necessity for the change upon the superior facilities thereby afforded for knowing and maintaining the Law.

When positive law has attained the greatest degree of evidence or of certainty, we might still try to evade it through ignorance or evil design. It may, therefore, be necessary to give it an external mark which places it above all individual opinions and facilitates the repression of injustice. Positive law, translated by language into sensible characters and clothed with absolute authority is called law, and the making of law is one of the noblest attributes of the supreme power of the State.[2]

From this it follows that Legislation originally concerns itself only with existing law. "In other words, a statute is the expression of popular law:"[3] and to obviate the objection that they frequently proceed from authorities who seem to have little enough connection with the popular wants, Savigny is bound to assume that the Legislator is forced by circumstances to express the wishes of his age.

[1] *System*, sec. 12. [2] *Ibid.* sec. 13. [3] *Ibid.*

To doubt this it would be necessary to conceive of the legislator as standing outside the nation; but, on the contrary, placed in the centre of the nation, he reflects its spirit, its opinions, and its needs, and must be regarded as the true representative of the national mind.[1]

We need not pause here to discuss how far this picture of Law conforms to actual facts. This is the function which Savigny assigns to it; whether it is to be adopted as a working hypothesis is another matter. But lest he should seem to assign to Legislation too slight a part, he proceeds to show the importance of the functions it has to perform. These are of two kinds, it has to complete the positive law and to aid in its progressive development. Thus I have already pointed out that there are many matters which are with difficulty determined by custom, and that here there is a tendency to adopt an arbitrary decision in the first instance and follow it afterwards for the sake of ease. In these matters it is obviously better to have the first case decided in a more competent manner, and they are therefore a proper subject for Legislation. But the part which it has to play in assisting the development of Law is still more important. This cannot be better described than in Savigny's own words.

When the change of manners, of opinions, and of needs requires a change in the law, or when the progress of time calls for new institutions, these new elements may be furnished by that invisible force which created positive law. But here, above all, the intervention of the legislator appears as beneficial and even as indispensable. As the different causes of which I have

[1] *System*, sec. 13.

spoken act only slowly and by degrees, there is necessarily a time of transition in which the law is uncertain, and it is to put an end to this uncertainty that Statute Law is required. To take another point of view also: the different institutions of law are connected with and react upon each other; every new principle may, therefore, without our being aware of it, contradict other principles which are not meant to be impugned. To smooth away these difficulties, we require calculations and combinations which are hardly possible save by way of personal action.[1]

It is clear again that when we wish to abolish a principle that has been settled by statute, it is much more convenient to do this by way of statute also; for even though Custom be permitted to abrogate Statute Law, yet it is clear that it must first acquire a high degree of precision and force. The difficulty of deciding whether this has been attained is easily removed by passing a repealing statute.

It is curious that Savigny appends to this, as a remark which must indeed be made, but which demands little attention, the fact that Legislation often has to usurp the whole domain of Customary Law.

Lastly, we see in the history of all peoples epochs when circumstances do not permit of law springing directly, as in primitive times, from the common consciousness of the people; it is then that the legislator takes charge of a work which cannot long remain interrupted. Never has the change been effected in a more visible and sudden manner than under Constantine, and starting from his reign, Law was continued only by the numerous decrees of the emperors.[2]

It is obvious at once that this case is really one of such importance in actual life, that Austin, in founding his system, paid attention to no other. All

[1] *System*, sec. 13. [2] *Ibid.*

law he ascribed directly or indirectly to Legislation, and refused admittance entirely to that law, testified by custom, to which Savigny attaches such importance. The importance, indeed, which Legislation tends to acquire at the expense of Customary Law is expressly recognised by more recent writers. Thus Windscheid remarks that the development of Legislation necessarily thrusts Custom into the background, and that as legal relations increase in complexity, and the differences between individuals become more and more marked, Custom, save in so far as it takes the shape of Scientific Law, must abandon the field to Legislation. "Thus, for modern times, Legislation is practically by far the most important source of Law, though it is not the first in order of time."[1] But as I have just remarked, Custom, instead of giving way entirely to Legislation, may make room for Science to take its place. This will lead us to consider the position and functions of Scientific Law.

3. *Scientific Law.*

In course of time, as human relations increase in complexity and rules of law in number, it becomes impossible for the latter to subsist any longer in the consciousness of the people.

Then we have the formation of a special class, that of the Jurists, who represent in the domain of Law the people of whom they form a part. This, however, is merely a new form under which popular Law pursues its development, and from this time

[1] *Pandektenrecht*, sec. 15.

it has a double life. Its fundamental principles subsist always in the consciousness of the nation, but their exact determination and points of detail in their application belong to the province of the Jurists.[1]

It is in such a change that we have the origin of legal Science, and this now appears under two aspects: it has its theoretical side and its practical side. The theory of Law is concerned with the gradual production of rules: the practice of Law with their application. The former is the special work of the Jurists, the latter of the Judges, though these functions are not always confided to different persons. The work of the Jurists, again, is of two kinds: they create new law and they arrange existing law. The former function they exercise in virtue of their position as representatives of the legal interests of the people; thus law created by the Jurists corresponds to the law created by the common wishes of the people as testified by general customs at an earlier date. "The latter function is purely scientific, for they take up the law, whatever may be its origin, in order to reshape it and reduce it to a logical form."[2] It must be noticed, however, that this has no slight influence upon the substance of the law itself. This fact Savigny expresses as follows:—

The scientific form which the Jurists impress upon the law, tending, as it does, incessantly to develop and complete its unity, reacts upon the law itself, gives it a fresh organic life, and thus Science becomes a new element in the making of law.[3]

This comparison, which the Germans are so fond of instituting, between social institutions and the forms of

[1] *System*, sec. 14. [2] *Ibid.* [3] *Ibid.*

organic life, is one that so far has been hardly applied to the province of Law by English Jurists. But it is clear that if we can once conceive of Law as a whole, whose various parts, while they have their own special functions, have yet a strong influence upon the other parts, we shall realise what Savigny means when he speaks of legal Science as completing the unity of the Law. To such unity Law can never attain except by the help of Science; the organic connection between the parts, however it may exist in reality, can never become operative until Science has defined the functions and position of each part. But when this has been done, we at once see what parts are defective and where Legislation is most required. It is in this sense, then, that the merely scientific, or, to speak more correctly, merely logical functions of the Jurists has an influence on the creation of law; it does not directly create, but it points out the way which Legislation, and which Science, by virtue of its creative function, must take in the formation of new rules.

Savigny passes on to notice a possible danger which is connected with this function of Science. But in following him we must distinguish carefully between the different objects which a Jurist may have in view in enunciating a rule of law. Thus, he may do it either with a view to making new law, or with a view to expressing existing law. It is to rules of the latter kind that Savigny now refers, and it is to these that the passages he quotes from the Digest also refer.[1] He points out, indeed, that the enunciation of the rule

[1] *Vide supra*, p. 242.

tends to confuse its real purport; it is supposed to have some inherent virtue of its own, whereas it is merely an attempt, more or less successful, to express the law. Hence a judge must only apply it so long as this is the best expression of the law of which he can avail himself. It is here that Savigny sees the dangers of complete codes; these clearly purport to consist only of rules of the latter kind. "They fix the law in the state in which they find it, they make it immutable, and so deprive it of the successive ameliorations which the progress of Science would naturally bring to it."[1]

It is necessary, in the last place, to examine the relation which Science bears to Legislation. This is of a twofold nature; I have pointed out that Scientific Law is the natural successor of Customary Law, hence Legislation must lend its assistance to the former, just as it did to the latter. Now, in the case of Customary Law, the assistance was of two kinds. Statute law gave precision where precision was wanting, and decided between rival opinions where unanimity did not exist. The first kind of help is not wanted in Scientific Law, the second is. Here, then, we have the true province of Scientific Law in its creative function marked out. Where there is unanimity among Jurists, their opinions create law; where there is no such unanimity, Legislation decides between them. In this latter case Scientific Law provides, like Customary Law, the appropriate matter for Legislation to work upon.

[1] *System*, sec. 14.

But Science has a more intimate connection with Legislation even than this; it has what we may call a personal influence upon it. Thus, not only do the Jurists supply the subject-matter for law, but when this has received the approval of the Sovereign power—that approval which stamps it as Statute law—it again passes to them before it is capable of application. It is their function to interpret the laws, and it is permitted to them to add such explanatory matter as cannot well be introduced by the legislator himself. "And so the labours of science facilitate the application of the law and ensure its empire."[1]

It may be worth while to quote further the passage in which Savigny justifies the prominent position which he assigns to the Jurists.

> We see, then, that the Jurists have a very extensive influence upon positive law. Those who repudiate this influence as an unjust pretension would be well founded in their criticism did the Jurists form an exclusive caste. But as any one may become a Jurist by going through the necessary studies, their pretension merely amounts to this, that he who consecrates to the Law the work of his whole life, shall be allowed by reason of his knowledge to have a more extensive influence upon the Law than other men.[2]

Finally, we must not suppose that Scientific Law cannot exist until the legal wants of the citizens make it absolutely necessary. Its rise depends upon special circumstances as well as upon necessity, and these may either accelerate or delay its actual appearance. Thus its appearance is accelerated when the knowledge of rules of law is at an early period

[1] *System*, sec. 14. [2] *Ibid.*

confined to a special caste, and when the consciousness which these have of the Law is allowed to take the place of that consciousness which should reside in the people.

So far I have stated the views of Savigny only on the position and functions of Scientific Law; but the question is one of so much interest and importance that it may be worth our while to examine it more carefully. It is generally admitted that the work of the Jurists is, as he says, of two kinds—logical and creative. We will consider these in order.

A Jurist, when he has a given collection of laws presented to him, has first to arrange them in systematic order. This will reveal to him the defective parts, and he may then attempt to fill the gaps in two ways—either by deducing new rules from established principles, or, if this will not suffice, by creating new law. With the latter mode we are not at present concerned, but the former is a part of the logical function of Jurisprudence. If, then, we enquire what is the basis upon which such rules rest for their validity, we find that they depend solely upon the correctness of their deduction from settled principles. Hence prevailing opinions as to their validity, and the previous practice of the courts, are only presumptive evidence of such correctness, and any judge who is convinced of an error in them is at liberty to apply the rule in what he conceives to be the correct form.[1]

If, in the next place, we turn to the creative

[1] Puchta, *Pandektenrecht*, sec. 16.

function of science we find more difficulty. There has been an opinion that new rules, logically obtained, do not owe their validity to any connection with established principles, but that they may be deduced from Natural Law. This, however, has a tendency to render them unsuitable for application in practice, and the opinion is now generally abandoned. If, then, Jurists are not to make new rules at pleasure and in accordance with Natural Law, and if, as is admitted, they do make rules of some kind, what is the nature of these rules, and to what do they owe their validity? This is a question which has excited much interest, and which has been specially discussed in reference to the introduction of the Roman Law into Germany.[1] Thus, it being admitted that the people are the ultimate authors of all law, new rules propounded by Jurists may hold good on one of two grounds, on the ground, viz., that their authors express in a form suitable for application ideas and wishes which actually exist in some vague manner among the people; or on the ground that they have sentiments and views upon legal matters which correspond generally to the temper and disposition of the people, and so make them suitable to be its representatives. Upon neither hypothesis, indeed, can the introduction of the Roman Law be justified as a national act, for neither people nor Jurists had direct knowledge of all the rules which it contained. As I have already pointed out, its introduction can only be regarded as a fact due to the peculiar circumstances

[1] *Vide supra*, p. 256.

of the Middle Ages. The true function of the Jurists, as representatives of the people, lies in choosing and adapting such portions of it as are really suitable for popular use, and in thus converting it from a foreign to a native system.[1]

Certain parts, indeed, of the law which is created by Jurists are of so technical a character, that there can be no question of the people having any direct ideas on the matter. Of this nature are the rules which form the practice of conveyancers. But if we are to allow to Jurists any power at all of creating new rules, it must be on the ground that they are specially fitted to represent the wishes of the people in legal matters, and admission to their number must be so arranged that these wishes shall always be likely to find adequate expression among them.

It will be useful now to recapitulate the various functions of Scientific Law.

1. Logical.
   - *a.* It arranges the whole Law in a scientific manner, and exhibits its leading principles.
   - *b.* In doing this it discovers many gaps, and fills these up as far as possible by deducing suitable rules from existing principles. The validity of these rules depends upon the correctness of the deduction, unless they are afterwards ratified by custom. Such custom may be signified by judicial usage, and hence arises the binding nature of Case Law.

[1] Windscheid, *Pandektenrecht*, sec. 10, note 4.

2. Creative.

   a. It creates rules upon special technical matters; this it does because they are questions with which only experts are capable of dealing.

   b. It creates new rules in matters where the wishes and interests of the people require it, and where there is practical unanimity. This it does because its professors are qualified to represent the people, who in former days would themselves have effected this change by a change of custom.

Having thus examined in detail the three sources of Law,—Custom, Legislation, and Science,—Savigny next proceeds to consider how their various functions are combined so as to produce a harmonious unity in the law. The result at which we have arrived is, that all positive law is in its origin popular law, but that Legislation is often necessary to assist it and to supplement it. When in the course of time Science is rendered necessary, this merely continues in the most convenient way the work of popular law. But often the people lose the power of originating law altogether: we must then look for legal changes to the two other organs, Legislation and Science; and not only, indeed, do changes in the law now proceed from these sources, but as Customary Law is often produced over again by one of them, its true origin is forgotten, and thus it ceases to be looked upon as an actual source of law. The following remarks are worthy of

attention from the comparison they suggest with Austin's system:—

> Legislation, owing especially to its external authority, has such a preponderance that we are easily led to regard it as the only source, properly so called, of law, and to see in all the rest only secondary and supplementary sources. But law exists in its proper state there only where we have a harmonious agreement between these various forces that create it, and where none of them is isolated from the others; and in order that Science and Legislation, the origin of which is essentially separate, may not work merely by chance, it is important that the Legislator and the Jurists should have sound ideas upon the origin of positive law, and upon the relation of the different forces which produce it.[1]

So far, it will be noticed, there has been no attempt to formulate any principle of legislation. Everything is founded ultimately upon custom, and the province of Statute Law has been restricted to expressing or supplementing this. It is possible, however, in the following remarks of Savigny to discover something approaching an attempt to establish Legislation upon a more independent basis. Thus he proceeds to draw a distinction between the two elements in Customary Law, "the one individual and peculiar to each people, the other general and founded upon the common nature of humanity."[2] It is from this circumstance that two schools have arisen in the study of Law; of these one is careless as to the principles upon which Law is founded, and, regarding them as merely accidental, is content to busy itself with the actual forms in which they are expressed; the other considers that there are principles of Law which are founded upon

[1] *System*, sec. 15. [2] *Ibid.*

absolute truth, and that it is to these that all particular systems ought to conform. "The latter reduces law to an abstraction without life, the former mistakes the dignity of its vocation."[1] Savigny attempts to reconcile these two schools by pointing out that the one represents an end to which the other should strive to attain. He says: "We avoid this double error by assigning to Law a general end which every people is called upon to realise historically."[2] To an English jurist it is clear that this general end is to be found in the principle of Utility, but it is important to understand clearly the meaning which Savigny assigns to it. Thus he says, "The general end of Law is to be found in the moral law of man from the Christian point of view."[3] The first objection to this, of course, is that it is transplanting Religion into the sphere of Law. A more minute examination, however, will show that this objection must not be entertained too hastily, for the influence of Christianity, so far as Law is concerned, is limited to laying down a principle of morality, and not definite rules. Thus—

> Christianity does not pretend to be merely a rule of our actions; it has, in fact, modified humanity itself, and it is found at the base of all our ideas, even of those which seem to be most foreign and most hostile to it.[4]

There seems, indeed, to be nothing here to which even the strictest Utilitarian can take objection. Stripping Christianity of all those portions which it would be improper to introduce in this place, we may say that its main object was to enforce that portion of

[1] *System*, sec. 15. [2] *Ibid.* [3] *Ibid.* [4] *Ibid.*

the principle of Utility which most needs enforcing. This latter principle requires that the object of social action, and therefore of Law, which is one form of social action, should be the attainment of the greatest good for the greatest number. It recognises that, as a rule, this object is best attained when each individual devotes his energies to his own advancement; at the same time, he must be ready to sacrifice this whenever the good of the community requires it. The former injunction needs no teacher of morality to enforce it; the latter represents a principle which was long struggling for expression, and which at length found it in the teaching of the Founder of Christianity. Its necessity, indeed, has been recognised in the only systematic attempt that has yet been made to establish a new religion, and however Positivism may repudiate the pretensions of Christianity, it is at least indebted to it for the principle of Altruism upon which its whole existence is founded. The function of Christianity, moreover, is not only limited to making the principle of Utility applicable in practice; it is by its light also that the fundamental formula is interpreted. The two terms of this are "greatest good" and "greatest number;" but the former is almost universally repudiated unless it includes the individual happiness which results from a consistent application of the altruistic principle; and the latter would certainly not be construed to mean all men of all nations but for the influence Christianity has had in breaking down the barriers between man and man. However much these re-

marks may to some appear out of place, it seemed necessary to make them in order to discover the germ of truth which exists in Savigny's account of the object of law. We thus see that he means no more in reality than Bentham, though he gives a form to his opinion which, at first sight, implies a great difference. Bentham enunciates the principle of Utility; Savigny points to certain well-known rules of morality which are necessary to the working of this principle, and which, to the impartial mind, are indicated by the word Christianity. The latter justifies here, as elsewhere, his claim to belong to the historical school of Law. His view is not inconsistent with that of Bentham, it is merely more concrete. Each of them recognises the two motives to human action, the selfish and the altruistic. Bentham, however, starts with an abstract principle and derives them both from this: if, moreover, he were asked how he proposed to attain their realisation in life, he would probably say, the first realises itself with tolerable ease; the second has had, and now has, a hard struggle for realisation, but one of the most potent factors in its gradual victory has been the influence of Christianity. Savigny, on the other hand, starts from actual life. Looking around him he sees that the selfish principle is often enough embodied in legislation; the changes that are required are mostly upon an altruistic basis, and this is presented to him in the form of Christianity. The practical outcome of each way of looking at Law is, so far, very much the same.

A similar view, though without the same direct reference to Christianity, is put forward by Trendelenburg. Thus he says that "Law strives to grasp the special intention of moral relations, and regulates the external conditions under which they can succeed."[1] This has, indeed, been preceded by an enquiry into the nature of these moral relations, and it has been shown that they have for their object the gradual development and improvement of the Whole and of its individual members. There is, indeed, a curious distinction between the tests which the German and the English schools assign for Law. Bentham separates Law from Morality, and proposes as its test the principle of Utility. Against this the objection lies that it seems at first sight, at least, to neglect those higher ethical advantages upon which the welfare of man chiefly depends. Trendelenburg does not recognise any such distinction between Law and Morality, but asserts that Law is something added to Morality for the sake of carrying out its intention. So, too, Savigny will not allow of any lower object being associated with this. Thus he says:—

> This end is quite sufficient for Law, and it is useless to add to it another, and quite a different one, under the name of the public good, and to place by the side of a principle of Morality a principle of Political Economy. In fact, Political Economy, seeking to extend our empire over external nature, can only wish to multiply and ennoble the means which lead to the accomplishment of the moral destiny of man, but that does not constitute a new end.[2]

The same idea is expressed by Trendelenburg

[1] *Naturrecht*, p. 75. [2] *System*, sec. 15.

when, in replying to the objection that his definition of the object of Law leaves out much that is important, he says that "body and limbs, life and health, are conditions for Morality, and their protection falls easily under the definition."[1]

We thus see that Bentham proposes a test for Law which may or may not be one for Morality also, while the Germans establish their rules of Morality first, and then charge Law with the function of facilitating the performance of them. It may be remarked, too, that while Bentham enunciates the principle of the greatest good of the greatest number, he seems to neglect the individual; the Germans are careful to recognise expressly that Morality consists in the adjustment of the claims of the individual with those of the Whole.

According to the view which we are here considering, Law has for its object the preservation of the external conditions for the realisation of Morality. Apart from the fact that this may sometimes require the use of force, which I shall consider later on, the real meaning of it is, that rules of law are necessary in order to show how rules of morality can be observed. This idea is brought prominently forward by Savigny, though it is doubtful whether he sees its real significance, when he is considering the difference between Rights to one's own person, and Rights over property and over other persons. He says that the former need not be recognised in positive Law, and that the rules which govern them are

[1] *Naturrecht*, p. 91.

wrongly placed on the same line as the rules which govern other Rights.[1] But what he really means is, that security to the person is sufficiently protected by rules of morality, and nothing more need be added to these for any one who is ready to observe them; while rules relating to property and contract must necessarily be laid down by Law before the rules of morality which concern these matters can be observed. To this point I shall return later on.

We have thus discovered what is, according to the German view, the test of Law, and what is the relation which exists between Law and Morality. At the same time, it cannot be denied that Law, as it actually exists, is sometimes opposed to rules of morality, and sometimes fails to carry them out perfectly. Hence the *jus strictum*, or *ratio juris*, must continually try to adapt itself to the real wants of men, or, using the old terms, to the requirements of *æquitas*, or *naturalis ratio*. This leads us to consider the methods in which equity strives to alter the law, and as I have already made some remarks on this subject, it will be useful to consider the manner in which Savigny treats it. According to him, then, the action of equity upon law is exerted in the following ways:—

I. Equity strives to alter the strict law directly.

II. Equity strives to influence it indirectly.

1. When moral considerations are allowed to influence law, as in allowing weight to *boni mores*.
2. When the interest of the State is concerned (*publica utilitas, quod reipublicæ interest*).

[1] *System*, sec. 53.

3. When special precautions are taken in favour of particular matters or particular persons (*ratio utilitatis*); hence the special rules for trade and for the protection of women and minors.

Thus we may distinguish two kinds of Law.

1. Law which exists independently, and, so to speak, in its own right; whether it be the old *jus strictum*, or whether it has been modified to meet the requirements of *equity*.
2. Law which is modified in practice by other considerations, which do not properly belong to its domain, such as *boni mores*, and the various kinds of utility.

It will be noticed that this division corresponds with what was said in the second chapter as to Law and Equity. In the first class we have both the original rules of law and those which have been placed on a broader basis so as to include temporary rules of equity. In the second class we have permanent rules of equity.

But though a goal to which all legislation must tend has thus been found, yet the facts of human life render it necessary to observe much caution in approaching it. On this matter we have the following interesting passage:—

The existence of the two elements of positive law once recognised, the special element and the general element, a new career is opened for legislation. In fact, as the progress of law

depends upon the reciprocal action of these two elements, the legislator must keep the general end before his eyes and constantly approach it, but at the same time he must do no prejudice to the energy of individual life. Thus many gaps present themselves to be filled up, many obstacles to be removed, and the legislative authority may lend the happiest assistance to the insensible action of the popular spirit. But we can never be too much on our guard against arbitrary action and against exclusive views, for fear of stifling the life and the progress of Law. Here, above all, the legislator must be able to appreciate true liberty, and it is here that we often see the greatest deficiency in those who have the name of liberty always in their mouth.[1]

Savigny concludes his remarks upon Law in general by a consideration of certain distinctions between different kinds of laws. The only one to which we need advert here is that between law properly so called, and rules which hold good only as exceptions; the latter form the subject-matter of that *jus singulare* which I have elsewhere described, and which has just been referred to. Decisions in accordance with rules of law proper are said to be according to the *ratio legis;* those in accordance with the other class of rules against the *ratio legis.* I have already pointed out that a rule of *jus singulare* is merely an attempt to adapt the law to the necessities of actual life, and hence it is derived from a direct appeal to utility. We must notice, further, that Savigny recognises that twofold destiny which we have seen to await such rules. They may either remain permanently outside the regular law, as exceptions to it, or, in course of time, they may become incorporated into its sub-

[1] *System*, sec. 15.

stance. This distinction seems to be implied in the following passage:—

> From what precedes we see that the *jus singulare* is general and not historical in its character. It may, however, assume the latter form, if the principle which is at first foreign to the law ends by becoming assimilated to it, and if what was at first *utilitas* becomes in course of time *ratio juris*.[1]

For an example of this he refers to the doctrine of acquisition of property by means of free persons.

Before leaving this point we may notice that the German writers fully recognise that there is a sphere in which Law must not seek to interfere with Morality. Thus Law is concerned in general with the Whole, not with the Individual. So Trendelenburg says:—

> It is important to recognise what the Law cannot and ought not to determine. Since it is applied to the community it withholds itself in general from all that belongs to individual morality.[2]

We have already seen how Savigny compares the Law to an invisible line drawn round every man, defining for him the province of his Rights. "In this," he says, "is revealed the mark which shows at once the resemblance and the distinction between Law and Morality. Law serves Morality, not by accomplishing its precepts, but by assuring to the individual the exercise of his free will."[3] We must notice, indeed, that the word morality is here used to denote character, not a system of rules, and the distinction is important. Law, as we have seen, does assist many rules of morality by ensuring their observance

[1] *System*, sec. 16. [2] *Naturrecht*, p. 81. [3] *System*, sec. 52.

as well as by making this possible; but Law itself rests ultimately, like the rules of morality, on the character of the individual. Hence it is wise for it to abstain from interfering with the individual too much, not only because it has to consider chiefly the interests of the community as a whole, but also because it is only by allowing freedom to the individual that the robustness of character on which all Law and Morality depend can be formed.

We have now to consider certain elements in Law which, though they do not appear in the definition, are yet necessary for its existence. We have seen that it is defined as a rule of actions, and we have seen how these rules are made; but we have still to discover how they are ascertained and enforced in any given case, and this will lead us to discuss the judicial and the penal functions of the State. We start from the position that the first object of Law is to lay down rules by which Morality (*i.e.* current Morality) can be carried into practice. Thus, the rule of morality which forbids theft is useless unless rules are laid down which shall govern the devolution of property. But when we come to apply these rules differences of opinion may arise, and it is for the settling of such differences that civil courts are established. It is important to grasp clearly the distinction between deciding a contested case and enforcing a rule of morality; it has, indeed, been expressly noted by Bethmann-Hollweg. Thus he points out that there are two cases in which the State is called on to intervene by its judges: *first*, where there is a

direct revolt of the individual will against the general will, or against the Law, *i.e.* where there is a crime, a conscious violation of the Law itself; in this case the business of the judge is merely to pronounce judgment and award the proper punishment: *secondly*, where the Right of one individual is encroached upon by another; here there may be no intention of violating the Law itself, but rather it is to this that each of the individuals appeals; we have here a contest at law, and we only want a decision as to the rule which is to govern it.[1]

We thus see that the possibility of making use of Law at all requires that there should be proper means of determining it. This, then, may be said to flow by way of necessary deduction from its definition. Must we, however, say the same of the Force which is sometimes necessary to ensure the performance of the Law, in other words, is the Sanction a necessary element in it? This is denied by various authors, because the existence and the utility of Law can be conceived without any such element. This, indeed, may seem strange to an English reader, but of the fact there is no doubt. Thus, as I have before remarked, Savigny regards it as a sign of malady if Force has to be brought to the help of Law, and refuses to found the State as many do upon this idea. "According to these authors," he says, "the State is a coercive force, which we might do without if all wills were ruled by justice, while, in my opinion, the State would then shine with fresh lustre and power."[2] Windscheid, who in gen-

[1] *Der Römische Civil Prozess*, i. 19. [2] *System*, sec. 52.

eral follows Savigny, speaks in the same way; thus, after stating that a Right consists in a certain power of ruling the wills of others, he remarks—

> That the State must, when necessary, confer validity on this power and dominion, follows directly from its task as guardian of legal order, but does not necessarily belong to the idea of Law.[1]

Trendelenburg, although he recognises the real necessity of Force, and goes so far as to say that Law is merely Morality supported by Force, yet is careful to point out that in a community of just men, although every one were wishful to keep within the limits of the Law, Law itself would still be necessary. The noblest explanation, he says, leans that way, and thus we see that Force is no essential constituent element in the idea of Law, but is introduced as a mark of the second order.[2]

It is important to grasp clearly the view of Law which is thus set before us. The rules of morality rest ultimately upon the assent and practice of the people; upon the same assent, then, do the rules of law, which are merely explanatory of the rules of morality, rest. Thus Law is a rule intended to secure the observance of Morality, and resting, directly or indirectly, on the assent of the people. This assumes that there shall be organs for declaring it generally (Legislation in its various forms), and organs for declaring its application in particular cases (Courts of Law). So much is necessarily implied in the idea of Law. But we have also to face the fact that the wills

[1] *Pandektenrecht*, sec. 37. [2] *Naturrecht*, p. 90.

of individuals are not always in accord with the will of the community. Thus Savigny says:—

> Every individual may, in virtue of his liberty, act in opposition to the idea and the wish manifested by him as a member of the nation. This opposition is injustice, or the violation of the law, and it must be repressed if we wish to preserve for Law its empire and existence. In order that this repression may not be the work of chance, in order that it may be executed in a regular and certain manner, we require the intervention of the State.[1]

The same is, of course, asserted by Trendelenburg, who bases the idea of Law on the maintenance and preservation of the Whole together with its association of members. Thus both the obligation on the members to acts and omissions, and the compulsion which dwells in Law, spring from the same source, or, as he says:—

> Since the members as members, and men as moral agents, have their position only in the Whole, so, on their part, are they bound to services by which the existence of the Whole is possible, and they are bound to omit what will destroy the necessary union. To this obligation of the members corresponds, if it is not fulfilled, the compulsion of the Law, which springs from the moral power of the Whole over its members, and is regulated in accordance with the aims of morality. Compulsory Law preserves in the ethical association the endangered co-operation of the parts.[2]

In the face of the actual Force existing in the world as a part of Law, it may seem superfluous to justify its use in this way, but we must remember that we are dealing with a theory of Law radically different from that prevalent in England. We have here, ostensibly at least, no sovereign and no subjects; we have merely the union of individuals in one

[1] *System*, sec. 9. [2] *Naturrecht*, p. 76.

Whole, which is regulated by Law. In general, Law is observed by the members willingly; when this is not the case, Force must indeed be employed: but it is not enough to say that the Sovereign is in a position to use it, and therefore he may do so; we must have reasons, based on the constitution and objects of society, which shall justify this compulsion of one member by the rest. In this theory, as I have already remarked, we do not speak of a Sovereign, but of the State, and the State is merely an organ for expressing the will of the people. There is at least this advantage in seeking a justification for the use of Force, that we discover at the same time that it is not to be a mere blind repression, but a compulsion nicely adjusted to the end we have in view. There are, indeed, many reasons for encroaching no further than is absolutely necessary on the freedom of individuals, and this introduces once more a consideration to which I have already referred.

If we regard compulsion as existing in the service of that moral Whole which first completes itself in its moral members, and if, further, the condition of individual morality is freedom in individuals; then will compulsion, instead of being rude force, limit itself to the smallest possible proportion, and seek such a one as shall be most conducive to morality.[1]

I have now stated enough to give an idea of the theory of Law, which has been held by eminent German Jurists. I shall abstain from further comment on it till I have reviewed other theories also, but it may be as well to sum up briefly its leading points.

[1] Trendelenburg, *Naturrecht*, p. 90.

Man cannot be regarded as an individual existing in isolation: he is a member of society, and as such he must be treated. But if we survey the constitution of society, we see everywhere the individual trying to obtain as large a province as possible for the exercise of his will. In order to assign such a province definitely to each, and to prevent continual collisions, we require, in the first place, rules of morality. These are intended to advance the highest interests of the Whole, and of the Individual, and the essential point in them is, that they are few, universal, and well known. To supplement them, however, and to adjust the infinitely complicated relations of human life, we must have, in addition, rules of law. From this it follows that there must be proper organs for making the law, for deciding the law, and, if necessary, for enforcing the law, or rather for adding a penal sanction to the rules of morality. For this purpose the State is formed, and acts as the representative of the people. Sometimes, however, the people act directly, as in making Customary Law, or indirectly through other representatives, as when Law is made by Jurists. But in general the State acts for them in its legislative, judicial, and sanctioning capacities. The latter two capacities give rise to the law known as Civil and Criminal Procedure, together with Criminal Law. All these, as well as the great body of the law, are framed by Legislation; and it is important, then, to define the object which Legislation must have in view. We have seen that it must have a general idea of the principles on which morality is founded, and that it

must arrange the external conditions on which these principles can be carried into practice, remembering at the same time that the possibility of morality existing at all depends largely upon the amount of freedom which is left to the individual.

I may once more remark that I do not mean to imply that these ideas on Law have universally prevailed in Germany. They belong, indeed, to a modern school. Spinoza grounded his system on force just as much as Hobbes did, and Kant included compulsion as a constituent element in Law. It was the special way in which Savigny looked at Law, as arising by the assent of the people, and resting for its validity on that assent, which made it possible for him to see that Force was not essential to the idea of Law, though it might be necessary for its realisation. As I have already remarked, the most recent protest against this has been made by Ihering; and in considering, as I shall now do, the system of Austin, I shall take occasion to point out the special views which are held by this jurist—views which resemble those generally current in England, though they by no means coincide with them.

CHAPTER XIII.

THE ENGLISH SCHOOL OF JURISPRUDENCE.

In the last chapter I have, perhaps, explained a theory of Law which is not generally known to English readers; if in the present, on the other hand, I am passing over familiar ground, I only do so for the sake of symmetry, and in order to secure a complete view of the subject, before introducing the suggestions with which I shall close. I have already stated that the fundamental distinction between the two schools is that one treats law as a rule, emanating from the general will, and enforced where necessary by compulsion; the other treats it as a command issued by a Sovereign to a subject, and depending for its existence on his superior might. This distinction is apparent at the very beginning of Austin's analysis, where he speaks of laws in the following manner:—

> Laws proper, or properly so called, are commands; laws which are not commands are laws improper, or improperly so called.[1]

Laws of all kinds, proper and improper, may be divided as follows:—

> 1. The divine laws, or the laws of God; that is to say, the laws which are set by God to his human creatures.

[1] *Lectures on Jurisprudence*, i. 82.

2. Positive laws; that is to say, laws which are strictly and simply so called, and which form the appropriate matter of general and particular jurisprudence.
3. Positive morality, rules of positive morality, or positive moral rules.
4. Laws metaphorical or figurative, or merely metaphorical or figurative.[1]

It must be remarked, however, that of positive moral rules some are really commands and therefore laws proper; others are not commands, and so only laws improper.

Now, in considering the relation between similar things, we have several degrees. Thus, there may be a resemblance between them, or merely an analogy, strong or remote. This, of course, simply means that if we select one as the standard of reference and enumerate its essential marks, the resemblance or analogy of the others to it will be more or less strong according to the number of these marks that they contain. If, then, of the above kinds of laws we select positive law as our standard, we find that:—

1. Divine law, and some rules of positive morality are related to it by way of resemblance.
2. Other rules of positive morality by way of strong analogy.
3. And laws merely metaphorical by way of slender analogy.

Since, then, positive laws are connected with these other laws both by a common name and by possessing common properties, it becomes necessary to distinguish

[1] *Lectures on Jurisprudence*, i. 82.

between them. This, then, Austin proceeds to do, and the method adopted for doing so is as follows:—

1. To determine the nature of all laws properly so called.
2. To determine the marks by which each of the laws of the above four kinds is distinguished from the others. For this purpose they are considered in the following order: laws of God, positive moral rules, laws metaphorical, and positive laws.

The first of these processes determines what a positive law is, the second what it is not. But the Science of Jurisprudence is the Science of positive law; hence the province of Jurisprudence is by this means determined both positively and negatively.

In pursuing this course, however, Austin says that it will be necessary not only to determine the distinguishing marks of a law of God, but also to discover the manner in which it may be known. Hence his well-known examination into the theory of utility as an index to the divine commands, into the theory of a moral sense, and into a theory which, he says, is compounded of these two. In doing this he wanders, according to his own confession, away from the province of Jurisprudence, and attains thereby the following two objects:—

1. He places upon an intelligible basis the ordinary distinction of the Jurists between the two kinds of positive law, viz.—

i. Law positive, which is of human origin merely; this is equivalent to the *Jus Civile*.

ii. Law natural, which is positive law founded upon the law of God, and is equivalent in general to the *Jus Gentium*.

This distinction, he shows, is only intelligible if we assume as our test of Divine law that hypothesis which is compounded of the theory of utility and the theory of the moral sense.

2. But the second object is still more important. It is true that Austin lays down in emphatic terms that the province of Jurisprudence is confined to positive law as it is; but though he does not openly confess the barrenness to which the Science is by this restriction condemned, he does so tacitly by incorporating into the lectures peculiarly devoted to positive law as it is, a whole treatise on positive law as it ought to be. Not content with pointing out that a consideration of the test by which the Divine law may be known is the appropriate introduction to the science of Legislation, he himself rushes off into this tempting field, and before he returns to what he considers his proper task, he has established to his entire satisfaction the principle which must lie at the basis of the latter science. However, then, he may repeat that Jurisprudence is concerned only with Law as it is, we shall be safe in following the spirit rather than the letter of the Master's injunction. To justify this course, indeed, he proceeds to define the various departments of Ethics. Thus the science of Ethics is concerned with Law and Morality, as they ought to be, *i.e.* if they conform to the Divine law. But the science of Law as it ought to be is the science of

Legislation; and though the science of Legislation, or of Law as it ought to be, and of Jurisprudence or Law as it is, are perfectly distinct, yet they are connected by so many ties that one cannot be considered without the other.

Since, then, the nature of the index to the tacit commands of the Deity is an all important object of the science of Legislation, it is a fit and important object of the kindred science of Jurisprudence.[1]

It would be hard, perhaps, to express more clearly the fact that we cannot separate these two sciences, and that it would be more proper to take the word *Jurisprudence* as including the consideration of Law generally, both as it is and as it ought to be.

The general scheme which Austin follows out is therefore the following:—

I. To determine the nature of all laws which are laws properly so called.

II. To distinguish between the various kinds of laws, proper and improper; that is—

1. To determine the marks by which the laws of God may be distinguished from other laws, and herein to determine the nature of the signs or index by which these are manifested to man. This involves a consideration of—

   i. The pure theory of utility.

   ii. The pure theory of a moral sense.

   iii. The theory which is compounded of these two.

[1] *Lectures on Jurisprudence*, i. 85.

2. To determine the distinguishing marks of positive moral rules, and herein of positive moral rules which are laws imperative and proper, and of positive moral rules which are laws set by opinion.
3. To determine the distinguishing marks of laws metaphorical or figurative.
4. To determine the character of laws positive, and since it is found that a positive law is a command set by the Sovereign to the members of the independent political society in which the Sovereign is supreme, this involves a consideration of the nature of Sovereignty and of an independent political society.

I shall now follow Austin through so much of this scheme as seems necessary for the object we have in view.

I. To determine the nature of all laws which are laws properly so called.

Every law or rule (taken with the largest signification which can be given to the term properly) is a command. Or rather laws or rules, properly so called, are a species of command.[1]

The meaning of the word "command," then, is "the key to the sciences of Jurisprudence and of Morals," and our first business is to analyse its meaning with precision. This analysis is briefly as follows :—

A command is a signification of desire made by one person A, to another person B, together with a

[1] *Lectures on Jurisprudence*, i. 90.

power and intention in A to punish any disregard of his wish on the part of B. Since then B is liable to punishment if he disobeys the command, he is said to lie under a duty to obey it. Hence Command and Duty are correlative terms. Moreover, the evil with which B will be visited in case of disobedience is called a Sanction. Hence a Command is a wish expressed by A to B, accompanied with the threat of a Sanction; and hereby a Duty is laid upon B.

An attempt has been made to admit a reward as a means of enforcing a Command, as well as a Sanction; but Austin rejects this, chiefly on the ground that thereby no Duty is created. Hence

the ideas or notions comprehended by the term Command are the following:—

1. A wish or desire conceived by a rational creature that another rational creature shall do or forbear.
2. An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with his wish.
3. An expression or intimation of the wish, by words or other signs.[1]

Thus Command, Sanction, Duty, are inseparably connected terms. Each "signifies the same notion; but each *denotes* a different part of that notion, and *connotes* the residue."

Having, then, determined the nature of a command, it next becomes necessary to distinguish among commands those which may be further described as laws or rules. Austin decides that a law is not determined by its being a command issued to a class of persons generally, but by its being a command which refers

[1] *Lectures on Jurisprudence*, i. 94.

not to one action, but to a class of actions. Hence, among commands, a law is one which obliges a person or persons generally to acts or forbearances of a class.

A law being thus defined as a species of command, Austin proceeds to examine what this really means. He finds that a law must obviously proceed from superiors to inferiors; and, if it is asked what is meant in this case by superiority, we are told that it is simply the power of visiting the inferior with evil. He is, however, careful to add at once that this superiority rarely exists in human relations. The only absolute superior is God. Among men there is no monarch so powerful as not to have reason to fear that he may be met by a still stronger power in his people if he asserts his superiority too violently.

There then follows a discussion of various laws which, although they are not properly commands, are yet appropriately treated in the science of Jurisprudence; but we need only refer here to the remarks made upon Customary Law and upon Judge-made Law. It will be enough to sum up Austin's position as follows:—A rule of Customary Law, as such, is merely a rule of positive morality; it is only when it is actually adopted by the Courts that it leaves this state and becomes a rule of positive law. As to Judge-made Law, we assign to that its true position by distinguishing between commands which are express, and commands which are tacit. A rule of law, then, which is made by a judge, whether he merely declares a custom, or whether he introduces a new principle, becomes a rule of positive law in virtue

of the tacit assent which the sovereign power has given to its promulgation as a command.

As we have thus seen that Austin defines a law as a species of command, and that the superiority by virtue of which this command is issued depends upon superiority of force, it may be instructive to point out how the same notion has been recently adopted by the distinguished German jurist to whom I have frequently referred. In his work, *Der Zweck im Recht*,[1] he attempts to trace the origin and development of Law, and assuming, as he does, that society is based on Force, his great object is to determine how Force gradually learns to submit to control, and how the idea of Law is evolved; in other words, how Force comes to be exerted in accordance with Law. We shall at several points compare his results with those arrived at by Austin; but at present it is sufficient to note that he conceives of Law in the manner just described, as a Command resting upon the superior force of a Sovereign. This is abundantly clear from the following passages:—

> The current definition runs: Law is the collection of compulsory rules holding good in a State, and it is in my eyes quite right. The two points which it includes are the rule and the realisation of the same by force. Only those rules set up by the community deserve the name of Law which have Force, or since, as we have seen, the State alone possesses the monopoly of Force, which have the power of the State behind them; and herewith too it is implicitly asserted that only the rules to which the State grants this reality are rules of Law, or that the State is the only source of Law.[2]

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[1] Leipzig, 1877.

[2] P. 318.

Every rule contains a conditional imperative; it always consists, therefore, of two parts—the condition (the supposition, the constituent-fact) and the consequence (the imperative, the command); and thus it can always be put in the form: if . . . then . . .[1]

It makes no difference, of course, that the real command may be addressed to an officer of the government, for this implies also a command to the subject.

There is indeed no legal command which is addressed only to an officer and not also to a private person; it is indeed the absolute criterion of every true rule of law, that in the last instance an officer always stands behind it, who, in case of necessity, enforces it.[2]

There are important differences between the views of Law taken by Austin and by Ihering; but they agree to this extent, that with each of them Law rests ultimately on Force, and that the abstract idea of it is that of command. We shall find, however, that Ihering is careful to enquire how Law which thus rests upon Force comes to be finally superior to Force, and to bind the Sovereign as well as the subject—a point which Austin indeed notices, but which he does not attempt to bring within his theory.

II. Having thus examined into the nature of a law proper, Austin takes up the second part of his task, which is to consider how positive laws are to be distinguished from other laws, properly or improperly so called.

1. *Laws of God.*

It is perfectly easy to distinguish these from positive laws. They have, indeed, all the character of laws properly so called, but they are determined at

[1] *Der Zweck im Recht*, p. 337. [2] *Ibid.*

once by the superior from whom they proceed. Having settled so much, Austin, as I have already remarked, leaves his chosen task and commences an examination of the marks by which the Divine laws may be known, in order that there may be an intelligible test of the goodness of positive laws. It would be foreign to our purpose to follow him into this discussion. He maintains that the only test is that of general utility; and this is done with an accuracy and clearness which makes his work conspicuous among ethical writings. The practical outcome is that the champions of this theory, and those of the theory of a moral sense as indicating the laws of God, are agreed upon the chief rules of morality, and that in matters where such rules do not exist, all alike are content to take utility as the test. Hence the working hypothesis which has been generally adopted is the third which Austin considers, and this is set down as a mixture of the other two. The best proof that this has been found adequate to the distinctions of real life is seen in the fact that both the ancients and the moderns have founded upon it a distinction between different rules of law.

i. Where the rule of law is identical with a rule of morality, it is said by the Roman Jurists to belong to the *jus gentium*, and by the moderns to law natural.

ii. Where the rule of law is not identical with a rule of morality, it is said by the Roman Jurists to belong to the *jus civile*, and by the moderns to law positive.

This distinction, at least, is exact enough for practical purposes. It may be doubted, however, whether, as Austin asserts, it is intelligible only on the mixed hypothesis above noticed. The hypothesis of a moral sense merely says that large classes of action are known instinctively to be forbidden by the law of God; but it does not deny that many others remain which must be decided by expediency. The hypothesis of general utility does not deny that this test is applied with unequal certainty to different classes of actions. About the tendency of some there is universal agreement, and they are by common consent condemned: about the tendency of others there is no such agreement, and different people may hold different opinions. It may be doubted whether Austin need have introduced three hypotheses at all, for the pure hypothesis of a moral sense has probably never been seriously propounded. Whether then we adopt the theory of a moral sense or of utility, we equally have a distinction between rules which are universally recognised (*jus gentium*, natural law), and rules which may vary with different views of expediency (*jus civile*, positive law). Moreover, the former rules are constantly enlarging their borders at the expense of the latter. It is to the advantage, however, of the theory of utility that it clearly recognises how this is done. The tendency of all the chief actions of men is perceived at a very early time, and rules are laid down to regulate them; then, as our knowledge of social life increases, the tendency of actions which at first was doubtful becomes clearer,

and these, as they leave the sphere of opinion and reach that of practical certainty, are changed from rules of expediency into rules of morality. In immediate practice, then, there is little difference between the two systems: each has its domain of natural law, or law upon which all are agreed; and positive law, or law which is still a matter of opinion. The theory of utility, however, gives us an intelligible account of how the domain of natural law is spreading, and affords us a guide as to the measures by which we may assist it. On this theory a rule may in due time be found to govern all important classes of actions, and these rules are Austin's rules of Divine law. Where they have already been found they have become rules of morality, and if they are further enforced by legal sanctions they have become rules of positive law: but where these rules have not been discovered, the tendency of the corresponding actions is merely a matter of opinion, and the laws which govern them are positive laws merely. Thus, too, violations of the former correspond to the old class of crimes which are *mala in se*, and of the latter to those which are *mala quia prohibita*.

To this matter Austin returns in another place when he discusses the meaning of *jus naturale*, and it will be convenient to consider at this point the further considerations which are there introduced into the subject. It is only after some practical means have been discovered for the improvement of law that men arrive at the idea of a pattern to which all law ought to conform. In order to trace this order of

events Austin selects the progress of law at Rome. The peculiar circumstance in that case was the extensive intercourse between Romans and foreigners. Hence it became necessary to establish a special tribunal and system of law for the latter, and the form which this took reacted powerfully on the strict Roman law. Being founded partly upon considerations of general utility and partly upon actual laws current at Rome and elsewhere, it acquired a degree of flexibleness and liberality which was wanting to the old Civil Law, and as opposed to this, which was the *jus civium*, it was known as the *jus gentium*. Hence also, on account of these qualities and its obvious fairness as compared with the old systems, it became known as *æquitas*. But this method of making law was extended in course of time from the *prætor peregrinus* to the *prætor urbanus*, and so the law made by him, known as the *jus prætorium*, also came to be described as *æquitas*. Then as soon as Jurists abandon the practical side of law and commence speculation, a new turn is given to these expressions. The *jus gentium* is no longer the law which is conversant about foreigners, but it is now the law which obtains among all nations, and when it is asked why it thus obtains among all nations, the answer is, because it conforms to natural law. Hence the expression loses the exactness which it had before: men no longer think of a certain actual system as being superior to others, but they also conceive of a certain ideal system to which all ought to conform. Whenever, then, after this idea has been established,

we meet with the terms *jus gentium*, *æquitas*, or *jus naturale*, we have to consider whether they represent an actual system of law, or merely an ideal one.

Having thus examined the origin of the term *natural law*, Austin proceeds to examine the meaning which is assigned to it in modern Jurisprudence. The distinction between natural law and positive law seems to rest upon the fact that some rules are of such obvious utility that any society, although it were in a savage state, would observe them; while others would not be observed in such a society, either because it had no need for them or because it was too ignorant to discover them. This is really equivalent to saying that natural law is that which obtains as positive law in all political societies, whereas positive law obtains in some one or more only; for as some political societies are but little removed from the savage state, it is probable that any law which is observed as positive law by all political societies would be observed as a moral rule by a savage society. Hence, among the moderns, natural law means that law which obtains in all political societies, and so far is equivalent to the *jus gentium* of the early period of Roman Law. It is, however, more extensive than this, for it includes not only rules of positive law, but those moral rules which are common to all nations, and in particular the rules of positive morality which govern their mutual intercourse.

We may now compare this *jus naturale* with the Divine Law which Austin has been examining, and

enquire whether, upon the theory of utility, it does really correspond to any distinction in laws. Austin says that it does, indeed, correspond to an actual difference, but that it is practically useless.

> For every human rule (be it universal or particular) which accords with the principle of utility must accord with the Divine Law of which that principle is the exponent. So that all positive rules, particular as well as universal, which may be deemed beneficent, may also be deemed *natural* laws, or laws of Nature or the Deity, which men have adopted and sanctioned.[1]

There is a distinction here, however, which Austin seems to have overlooked. A law may seem to us beneficent, but yet we may not be sure that we have hit upon the one that is most in accordance with the dictates of utility. We may, therefore, adopt, as we have already done, a middle course between the two above laid down. Thus the Jurists in general say that natural laws are those which are set by the moral sense, or whose utility is obvious to every one: offences against these are *mala in se;* but that all other laws are merely positive, and offences against them are *mala quia prohibita.* Austin, on the other hand, says that natural laws are those which are either obviously of general utility, or which have been shown by experience or reason to be on the whole beneficent; hence all offences against these are *mala in se:* an offence is only *malum quia prohibitum* when it is committed against a law which is useless or mischievous, and then we have to consider whether the specific advantage to be derived

[1] *Lectures on Jurisprudence*, ii. 590.

from breaking the law is not more than balanced by the damage done thereby to the cause of order generally. But since we are now using the term *natural law* as indicating the ideal to which all law must conform, we should, perhaps, act more consistently if we made the following distinction.

Some laws are of such obvious utility that every one assents to them readily; we can have no better proof, then, that these conform to the test; they are, therefore, a part of natural law. Other laws are not of obvious utility to the people generally, because they want special study for their advantages to be realised; but to all who can give them this study their utility is obvious; these also are a part of natural law. A third kind of laws, again, are known to be merely attempts to discover what is of most utility; whether they have succeeded or not is at present doubtful; these, then, are merely positive. Offences against laws of the first kind are clearly *mala in se*, and of the last kind, *mala quia prohibita;* those against laws of the second kind are also *mala in se*, but whether a knowledge of them will be imputed to every one depends upon the degree of education at which the people have arrived.

Finally, we must remember that the term Natural Law means *either* those positive laws and rules of morality which are actually observed among and between all nations, *or* that Divine Law which is the test to which all positive rules, legal and moral, ought to conform. The fact that a law belongs to natural law of the first kind is the best evidence we can, as a

rule, get that it conforms also to natural law of the second kind, for common morality is due to the imperceptible accumulation of centuries of experience; and though moral teachers may improve it, it is impossible for any extensive alterations to be made.

We thus see that Austin introduces his test for legislation, not in its natural place after the definition of Law or of the manner in which Law is made, but incidentally, in considering the nature of Divine Law. I have elsewhere pointed out that the introduction of this term is perfectly useless, and indeed confusing, and that it merely enables Austin to examine the theory of utility as a test for legislation without too openly seeming to leave his subject. But as the matter is discussed at this point I shall consider in connection with it the views of Ihering. He proceeds to it in a perfectly logical manner. Having dealt with the formal parts of Law, with its aspects as a means of compulsion and as a rule, he next enquires as to the contents of it. We have already seen how other German writers first lay the foundations of Morality and then assert that Law is only intended to realise the external conditions for its existence. Ihering, however, follows Austin in excluding the idea of Morality altogether. The first point which strikes him is that Law is endlessly diverse. This he accounts for by saying that the aim in Law is not as in Science to arrive at general truths, but to discover the right means of attaining certain objects. A law, then, is good not because of its truth but because of its fitness. "The test of Law is not the absolute one of

truth, but the relative one of purpose."[1] Hence, as both the conception of the purpose and the means of attaining it may widely differ, we see that laws will vary at different times and places.

> The idea that Law must be at bottom everywhere the same, is no better than the idea that medical treatment must be the same for all patients; a universal Law for all people stands upon the same level with a universal prescription for all patients.[2]

The possibility of such an idea arises from the fact that certain laws are so generally suitable that they are found everywhere, and hence we have the old distinction between *jus gentium* and *jus civile*. This, however, does not alter the fact that the justification for every law is to be found in its fitness for securing a certain object, and it is the highest task of Jurisprudence to investigate and demonstrate this fitness.

It might now seem to be an easy step to pass from this to the assertion that the object of Law is to secure the greatest happiness of the greatest number. Such, however, is not the plan that Ihering adopts. This may indeed give a test for Morality and a test for the ultimate pattern of Law, but it is of little use for explaining actual systems of Law. The object of Law is to secure suitable conditions of life for the individual, and the question of what these conditions are is determined by the opinion of the individual. This way of stating the matter gets rid of the prejudice which frequently exists against utility in its bare form. Thus, after pointing out that eating, drinking, cloth-

[1] *Der Zweck im Recht*, p. 430.

[2] *Ibid.* p. 431.

ing, etc., form part of the conditions of life for each individual, Ihering goes on to say:—

> But life means not merely physical existence; even the poorest and the meanest requires more from life than the mere maintenance of the same; how varied too are the conceptions of it, beginning in the case of one where they end with another; the idea of life which each carries in himself, his subjective picture of it, contains for him the measure by which he estimates the worth of his life, the object of his whole struggle, the motive of his will. The ideas to which in this sense life is subjectively bound I call the conditions of life. I understand thereby not only those of physical existence, but all the advantages and enjoyments which, in the judgment of the subject, give life its true value.[1]

There are several points in this view which call for notice. As compared with the doctrine of such a writer as Trendelenburg, we see that it lays stress upon the individual life rather than on the united life of the community,[2] though otherwise in the general objects which Law has to secure, it closely resembles it. But if we compare it with the view of Austin, or rather of Bentham, we find an important difference. This is not so much in the direct importance assigned to the higher purposes of life, for these can be derived from the principle of utility, but rather in the fact that the matter of the law is to be adjusted not to an abstract test, but to the subjective views of the members of the community. Utilitarianism may be said to tend to the same end, because Law then best promotes happiness when it satisfies existing wishes and expectations; but in such a case this is a mere deduc-

[1] *Der Zweck im Recht*, p. 435.

[2] But see further his remarks on the community as being the object of all law, p. 454.

tion from the general principle, not the principle itself. A further objection may indeed be taken that Ihering's view is not meant to set up a test for Law as it ought to be, but merely to explain Law as it is, but a moment's consideration will show that this establishes no real difference. The only practicable Law is one that conforms to the wishes of the people, or, as Ihering says, realises their views of the conditions of life; and the only practicable change in Law is one that is required to bring the Law into harmony with such views, or at least one of which it may safely be predicted, that it will speedily be followed by a corresponding change in views.

There seems to me to be much practical truth in this opinion, and it harmonises exactly with what I have already said of the making of Law. It contrasts favourably with Austin's fiction of a Divine Law as the test of legislation, and it has the great merit of being eminently practical. It does not present to us a far-off divine pattern, to which Law may ultimately conform; it is content to remember that Law is meant to express the wishes of individuals, that the happiness of each is only to be estimated by his own wishes, and that legislation can never hope to travel far in advance of these.

We have now to carry further our distinction between Laws proper, Laws which are analogous to Laws proper, and Laws metaphorical. Excluding for the present the last kind, the others may be divided as—

i. Laws (proper) set by God to men.

ii. Laws (proper) set by men as political superiors, or by private men in pursuance of legal rights.

iii. *a.* Laws (proper) set by men to men, not as political superiors, and not in pursuance of legal rights.

b. Laws (improper), closely analogous to laws proper, but which are merely opinions held about human conduct.

These three classes comprehend Divine Laws, Positive Laws, and rules of Positive Morality. We have already distinguished between the first two by considering the superior from whom they proceed. We shall now distinguish between Positive Law and rules of Positive Morality. Now, "a positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme."[1] Hence to describe exactly the marks which distinguish positive law, we must first analyse the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*. But as this analysis runs to great length, Austin is contented at first merely to hint at it, and he passes on to consider the marks of positive moral rules.

2. *Positive Moral Rules.*

These are distinguished from Positive laws by a negative sign. They are not commands, direct or

[1] *Lectures on Jurisprudence*, i. 181.

circuitous, set by a sovereign person or persons in his or their character of political superior. But amongst these we must distinguish.

a. Some are laws proper. They resemble positive laws in that they are imperative rules set by men to men, but they are distinguished from them in that they are not set by men as political superiors, or by private persons in pursuance of legal rights.

It is more important, however, for our purpose, to consider the next class.

b. Laws which are laws improper, viz. those which are set by public opinion.

The analogy that exists between these and law proper consists in the following points:—

i. In each case a desire for a certain course of conduct to be pursued is felt by a person or a body of persons.

ii. In each case an evil will probably result to the person who disobeys this wish.

iii. By this sanction or will, persons are inclined to obey, and hence, in each case a uniformity of conduct is produced.

We further see that the points of distinction between the two kinds of laws are as follows:—

i. In the case of positive law the wish is entertained by a determinate body of persons, it is capable of being exactly expressed in a command, and the sanction can be inflicted with certainty and precision.

ii. But in the case of positive morality, the body of persons who entertain the wish is undeterminate; they are therefore incapable of uttering it in an express command, or of inflicting the sanction with certainty and precision in case of disobedience.

We need not follow Austin into his more minute examination of how a determinate and an indeterminate body of persons are to be distinguished. It will be sufficient to notice certain relations existing between the three kinds of laws. Thus, as each is enforced by a sanction, these sanctions may be properly distinguished as religious, legal, and moral. Of moral sanctions, some, of course, are proper sanctions, as in the case of those enforcing rules of morality which are laws proper; but others are merely called sanctions by way of analogy. Moreover, each kind of law imposes a duty upon the persons to whom it is addressed. Hence, we have religious, legal, and moral Duties. The mention of Duty induces Austin to introduce here the corresponding term Right, though the full examination of it is reserved for a later place.

Lastly, it is necessary to consider the relations which these different commands themselves, so far as their substance goes, bear to each other. Thus all three may coincide, as in the case of murder; they may not coincide, as in the case of smuggling; or they may directly conflict, as in the case of duelling. Hence we see that a positive law may be superfluous, because its object is already attained by divine law or moral rules; or it may be impotent, when it strives in vain

to contradict one or both of these. Austin, moreover, points out that where positive law happens to coincide with divine or moral law, confusion arises as to its real origin. When coinciding with moral law, the positive law is said to be established by custom, instead of being established by the sovereign upon the model of pre-existing custom; and so, when coinciding with divine law (or the law of nature), it is said to owe its existence to this divine law rather than to be merely established in imitation of it.

3. *Laws metaphorical.*

I have already remarked that the words *analogical* and *metaphorical* only differ in representing different degrees of similarity. Now laws improper, which have been said to be related to laws proper by way of analogy, have one point of resemblance which is entirely wanting in the kind of laws now under consideration; they are supported by a Sanction. But "no property or character of any metaphorical law can be likened to a Sanction or a Duty. Consequently, every metaphorical law wants that point of resemblance which mainly constitutes the analogy between a law proper and a law set by opinion."[1]

The real similarity, however, which suggests this application of the word *law* consists in two points.

i. It is used when uniformity is observed in a series of events, since this uniformity resembles the effect of a law proper.

[1] *Der Zweck im Recht*, i. 211.

ii. This uniformity is very generally believed to be due to the will of a rational being.

Having thus criticised the metaphorical use of the word law, Austin proceeds to criticise a certain metaphorical use of the word sanction, introduced by Bentham when he speaks of physical sanctions. Thus, although he allows that these have certain points of resemblance with sanctions proper, yet the points of difference forbid the use of the term in this sense, save with so wide an extension as to destroy its usefulness. The points of resemblance are indeed the following:—

i. When suffered, physical sanctions are suffered by rational beings for acts or omissions of their own.

ii. Before being suffered they influence conduct.

The great point of difference is that they are not suffered for disobeying the desire of rational creatures. Hence, as the whole idea of Law consists in the conception of a command addressed by one rational creature to another, with an intention and with power to inflict an evil in case of disobedience, the great dissimilarity between the two cases forbids our applying the word Sanction in each of them, without robbing the word of its real force. And yet it might seem to be not impossible to find a very proper place for these sanctions in connection with the Divine law, which Austin has been at so much pains to expound. He has, indeed, just said that this is supported by religious sanctions; but if we enquire further what these religious sanctions are, we find ourselves on the horns of a dilemma which has been hitherto

carefully avoided. The whole manner in which Austin treats the Law of God, so far as its substance goes, makes it possible for all parties to use this term, it being understood that absolutely nothing need be assumed as to the nature of the Deity. But when we come to the procedure by which these laws are brought into action, what then? We must either say that the sanctions are really religious, consisting in direct judgments by God upon man, and then we are in the midst of religious controversies, or we must introduce those very sanctions which Austin specifically rejects. And this we can hardly avoid doing. If it be assumed that the rule which is most in accordance with Utility is the Divine law, and if we say that this is a command, we can hardly refuse to allow that the only sanction of which we have actual knowledge consists in that evil which naturally ensues upon breaking it. There are, indeed, two points in which it differs from an ordinary sanction. It is not invariably inflicted upon the offender himself, and when once incurred it comes inevitably of its own accord. This latter fact, however, contains in it nothing special. It is rarely that the legislator himself enforces his own laws; for this purpose he provides suitable machinery, and the only difference in this respect between a human and a natural Sanction is, that the machinery provided for the infliction of the one contrasts very unfavourably with the unerring certainty of the other. The only reason, then, that remains for denying to these evils the name of Sanction is, that they are not always visited upon the offender himself.

But this should rather increase than detract from their efficacy as such. It is here that we realise the intimate dependence of men one upon the other; the divine laws proper are addressed not only to the individual and supported by religious sanctions, but also to the race and supported by natural sanctions. We have here used the term *natural* instead of *physical*, because it includes moral as well as physical evil; we have, indeed, to adjust our rules of utility to ensure moral advantage and avert moral evil, exactly as for physical advantage and physical evil. We may say finally, that nothing shows more clearly that the divine law is enforced by natural sanctions, than that the occurrence of these is the surest way of knowing that the divine law has been violated.

This will be the most suitable place for pointing out that the distinction which Austin draws between positive laws and laws of nature, is a result rather of his peculiar views of Law than of what is perhaps the essential feature in the matter. The question has been recently discussed by Prof. Pollock,[1] and the general tenor of his remarks seems to imply that he inclines to the opinion which regards Law as a rule established for human guidance, and only appealing to force in exceptional cases. The real resemblance between laws of man and laws of nature is indeed very close, though it is seen rather in their effect than in their actual nature. Each alike produce regularity and order where otherwise there must be chaos and anarchy; of each, likewise, we may say that they are obeyed, because it

[1] *Essays in Jurisprudence and Ethics*, chap. ii.

is the nature of the men or the particles to whom they relate to obey them. There is, however, this distinction, that, so far as we know, the laws of nature are immutable, while the laws of man vary continually. Although, indeed, they rely occasionally on force, yet their real support lies in the fact that most men do, as a fact, obey them voluntarily; we may then, perhaps, reverse the order of ideas and say that positive laws vary with the varying nature of men in such a manner as to ensure that they will in general be voluntarily obeyed. Law is known by its results; where we see order reigning, whether in nature or in society, there we say there must be law: but of the order in nature we know nothing but the fact that it exists: of the order in society we know far more; we see how it is produced; we see it visibly depending on law—a law which, because the men whose actions it regulates are rational, must be discovered by themselves, and because they are free must be supported by force, but which, in general nevertheless, relies for support on the fact that it is suited to their natures.

4. *Positive Laws.*

Having thus settled the distinguishing marks of all laws other than positive laws, Austin now turns to the characteristics of these. He has already pointed out that for this purpose he must first ascertain the meaning of the terms "*sovereignty*," "*subjection*," and "*independent political society*." This he next proceeds to do, and with a minuteness which I shall not attempt to reproduce. I shall merely hint at those points

which will immediately serve our purpose. Thus we read :—

The superiority which is styled Sovereignty, and the independent political society which Sovereignty implies, is distinguished from other superiority and from other society by the following marks or characters :—

1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons.

2. That certain individual, or that certain body of individuals, is not in a habit of obedience to a determinate human superior.[1]

Thus of these marks one is positive and the other negative, and it is necessary for both to be present for the existence of a sovereignty and society of the kind in question.

It is, of course, seen at once that these tests contain in themselves elements of uncertainty: thus, how shall we determine what is meant by *bulk* and by *habit*, and how large must a society become before it can claim to be a political society. These are questions which in the nature of things do not admit of an exact answer.

Austin next determines the forms of supreme government and the limits of sovereign power. Into the former topic we need not enter: as to the latter it is observed that though there may be *constitutional* limits to sovereign power, yet there can be no *legal* limits. The constitutional law, then, which prevails in a state for the guidance of the sovereign consists of rules of positive morality. It must be understood, however, that this is only to be understood as against the sovereign body collectively; thus separate members of the

[1] *Lectures on Jurisprudence*, i. 226.

sovereign body may act in a way which is both unconstitutional and illegal.

Having thus discovered that the one fact upon which political society rests is this subjection of one part of it to another part, Austin proceeds to consider how this method of treatment squares with current notions as to political liberty. This he shortly defines to be such freedom from legal obligation as is left by a State to its subjects, and then gives vent to a very characteristic utterance on the matter:—

> Political or civil liberty has been erected into an idol, and extolled with extravagant praises by doting and fanatical worshippers. But political or civil liberty is not more worthy of eulogy than political or legal restraint. Political or civil liberty, like political or legal restraint, may be generally useful or generally pernicious; and it is not as being liberty, but as conducing to the general good, that political or civil liberty is an object deserving applause.[1]

The final end of government is the furtherance of the common weal, and this is attained in two ways: by conferring *Rights* upon its subjects and imposing relative Duties for the protection of these Rights, and by imposing such absolute Duties as tend to promote the good of the community at large, although they do not advance the interests of determinate individuals. Hence, as for the attainment of its object government always imposes Duties, whereas it only sometimes imposes Rights, it is clear that it proceeds rather by way of legal restraint than of political liberty.

It is now possible to give the correct definition of a positive law.

[1] *Lectures on Jurisprudence*, i. 282.

Every positive law (or every law simply and strictly so called) is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme.[1]

To this some slight corrections are added which it is unnecessary for us to introduce here.

We thus see that Austin, having defined Law to be a command resting upon the superior force of the Sovereign, does not specially concern himself with any limitation of such force; this may in fact exist, but it is outside the domain of Law to determine it. On the other hand, the previous view of Law that I have given regards it as a rule proceeding from and observed by the whole people, though enforced where necessary by compulsion. There is, however, a view intermediate between these two which recognises both the Force on which Law is supposed to be founded, and also that this Force is subjected to fixed rules, and that hence Law is binding both on the Sovereign and on the Subject. To a follower of Austin this sounds absurd, for he has been taught to believe that legal obligation can only result from superior force, but it may not be uninstructive to consider briefly the position which Ihering takes up.

I may point out, in the first place, that he loses all the support which might be derived for his argument from recent views as to the origin of Law in custom. We have seen that he regards Savigny's hypothesis as a mere romance, and being apparently unacquainted with the views which I have put forth, chiefly on the authority of Sir Henry Maine, he is

[1] *Lectures on Jurisprudence*, i. 339.

driven to the opposite extreme, and derives all Law from commands. He has already stated his opinion upon the power of the State in a way quite in accordance with Austin's views. Thus he says:—

> The absolute requirement of the State force, and one which is assumed by the very purpose of the State, is the possession of supreme power—a power which is superior to every other which comes within its province. All other powers, whether of one or of many, must be under it, and it above them; and so language denotes the one side of the relation as Subjection, the other as Sovereignty.[1]

Powerlessness indeed, he says, is the one crime of governments which the people cannot forgive. Despots have often been tolerated and almost worshipped, but anarchy is destructive of all society.

> He who puts an end to it, however this be done, though with fire and sword, the native usurper or the foreign conqueror, earns the gratitude of the community; he is their deliverer and benefactor, for the most intolerable form of political subjection is much better than an entire failure of government.[2]

Having thus established the State power as supreme, he defines Law as consisting of such rules as it enforces. To this I have already referred. But he does not stop here. He recognises that there are two points in Law—Force and Rule—and that Law only deserves its name when the Force is subject to the Rule. The problem, then, which has to be solved is briefly this: How does a rule arise out of mere force? or, since the sovereign power can be limited by nothing but itself, he investigates "the origin of Law by way of the Self-limitation of Power."[3] For this purpose Law is

[1] *Der Zweck im Recht*, p. 310. [2] *Ibid.* p. 312. [3] *Ibid.* p. 322.

traced through three stages, which are defined in the following manner:—

> He who has the power to dictate to another his course of action by means of a command can do this in three ways—either in every single case in which he thinks it necessary (single command); or in general for all future cases (abstract command); and, in this latter mode, either so that the command shall bind merely the other, or himself also (unilateral and bilateral obligation).[1]

Hence we have three stages in the development of Law, and it is not till we reach the last that its proper form is obtained.

It is in the single command that Ihering sees the origin of Law; but, as he confesses that of the actual existence of this stage history has preserved no trace,[2] his hypothesis deserves no more respect than that of Savigny, which he elsewhere so abruptly dismisses. We may therefore pass on to the next stage, in which the single is replaced by the general command of unilateral obligation. This, like all advances in Law, he says is dictated by selfishness. It is easier to issue general commands than isolated ones, and hence rules take the place of orders. But as these are meant to bind only the subjects, they fall far short of the true idea of Law: the object of Law is to secure legal order, and this is incompatible with the caprice of a despot. Yet even here we see the germs of later development. Already we have a certain amount of order and of equality—of order, for, though the perfection of this depends on the mutual co-operation of the two parts of society, Ruling and

[1] *Der Zweck im Recht*, p. 324. [2] *Ibid.* p. 332.

Ruled, yet still the regularity which rests on fear only is order of a kind; of equality, for, although the despot may prefer certain classes of the community to others, yet within these the maxim of equality must be applied. If we enquire, however, after another element in Law—that feeling of Right which in civilised communities it is meant to protect, and upon the healthy existence of which it does itself, according to Ihering, depend—we find that under despotism it can hardly come to maturity, but rather gives place to that dull submission to the inevitable which, in the form of Fatalism, paralyses Eastern nations.

We thus see that, for the true explanation of Law, the two points of Force and of Rule are insufficient. What, then, is wanting? We must pass on to the third stage, in which the sovereign power not only issues and enforces the rule, but is itself content to be bound by it.

> This it is that we mean when we speak of legal order (*Rechtsordnung*); this is the idea which floats before us when we speak of a dominion of Right and Law. . . . Law, then, in its fullest sense implies a bilateral obligation, the special subjection of the State power to the laws issued by it.[1]

It will be at once seen that we have here a very important addition to the idea of Law as expounded by Austin. Of course he did not fail to realise that in civilised countries the Sovereign is, as a rule, bound by Law, but he regarded this rather as a happy accident than an essential feature. But with Ihering Law has not obtained its full development until

[1] *Der Zweck im Recht*, p. 344.

Sovereign and Subject are alike bound by it. The only thing, then, which we have to consider is the manner in which this binding of the Sovereign is effected.

The fact that men have at length arrived at the idea that the Sovereign is bound by Law makes them distinguish his conduct like that of private persons, according as it conforms to the Law or not. The difference, however, that exists between Sovereign and Subject requires that disobedience in this case should have a separate name, and language supplies us with the term arbitrariness (*Willkür*). We may say, then, that "arbitrariness is the Sovereign's violation of Law (*Unrecht*), and that it is distinguished from that of the Subject in that one has Power with him, the other has it against him."[1] It must be noticed that this idea of arbitrariness cannot arise until Law has appeared as controlling Power.

The power of the will which has no Law over it is not arbitrariness, but mere Power; Power only becomes arbitrary when Law has appeared by its side.[2]

If, then, it is an essential element in Law that the Sovereign too should be bound by it, and if, nevertheless, the Sovereign is defined as the holder of supreme power, what certainty have we that this power will really be subject to the Law? This question Ihering discusses as follows:—

i. *The motive for the submission of the Sovereign.*

For this we need merely look to selfishness as

[1] *Der Zweck im Recht*, p. 346. [2] *Ibid.*

taught by experience. From the very beginning the Powerful has found that it is only by putting limits to his power that he can reap the full benefit of it. This Self-ruling, however, as in the individual, so also in the State, is a matter of slow growth.

It is by the tedious path of the development of Customary Law that Force has disciplined itself and has attained to Law.[1]

This mention of Customary Law may appear strange after the way in which Ihering has spoken of it, but the fact is that the growth of Law depends on two sources. We may well suppose that the universal obligation of Law first arises with the development of Custom; when, after this, the strife of different classes or tribes gives rise to the idea of Law as a command, we at once have the tendency introduced to which reference has just been made. Prudence requires Power to subject itself to limitations, and again the rule becomes binding on all alike. But when men, partly by the blind following of custom and partly by prudential restraint, have grown familiar with the idea of Law as binding Sovereign and Subject, then a sentiment corresponding to this grows up. *Law-abidingness* becomes, in fact, a part of current morality. Thus we see that the supreme power of Law begins in custom, is continued by prudence, and is finally upheld by morality. It is no objection to this that we are confusing Law and Morality, if, at least, any weight is allowed to the considerations that have been urged in favour of seeing more in Law than the mere Command upheld by Force.

[1] *Der Zweck im Recht*, p. 368.

But we require not only a general motive for the self-subjection of the State-power, but also some reasonable certainty that this motive will be efficient. Hence—

ii. *The Guarantees.*

These are found in the feeling of Right (*Rechtsgefühl*) which exists among the people and in the regular administration of Justice.

I have already tried to show how this feeling of Right is an important element in the growth of Law; it is, indeed, to define and protect this that Private Law in general arises, and it is here, indeed, that Law is first developed. His own private interests are those which touch a man most nearly, and it is in attempting to interfere with these that Governments first find the limits of their power. Afterwards the same feeling extends to Criminal and to Constitutional Law, and from their early struggles the people gain power to influence these also.

Here, then, we have the end of the development. Law and the feeling of Right both upon the same height, both mutually conditioning and supporting each other.[1]

We have now arrived at the close of Ihering's theory of Law; it takes its rise, indeed, in Force, but against this the feeling of Right is ever arraying itself. With us this is called public opinion, and Ihering differs from Austin and returns again to his native school, when he distinctly places the ultimate basis of Law upon this national feeling.

[1] *Der Zweck im Recht*, p. 371.

Only there where the national feeling of Right has raised itself to an irresistible power is Law secured against every attempt at overawing it; upon this guarantee rests in the last resource every security of Law. *Not* upon the Constitution; let one devise it as artfully as one will, none can be conceived which robs the State power of the ultimate possibility of treading Law under its feet. *Not* upon oaths by which men have thought to secure it; experience shows how often they are broken. *Not* upon the phantom of sanctity and inviolability with which Science has clothed the Law; it is an academical inviolability which does not check arbitrariness. What alone checks it is the real power which stands behind the Law,—a people who recognise in Law the condition of their existence and feel the violation of the same as a fatal blow at themselves,—a people who may be expected to enter the lists for their law.[1]

This is indeed the only view that, in my opinion, can worthily be taken of Law. It does not repose on force, but on the assent of a nation. To secure its utterance and its realisation the nation organises itself, and we have the apparatus of Government, with its division between Sovereign and Subject. To the Sovereign the whole force of the community is entrusted, but this is only to enforce the Law, not to break it. A nation is not civilised till behind this organised actual force there stands one which is universal though invisible, and against which the actual force is powerless. The mistake of Austin is that he bases Law merely on the command of the Sovereign, who in all societies where Law has reached its proper development is merely the servant of the national will; the mistake of Savigny is that he omits to show how the Sovereign power which arises with the growth of the State is to be kept in check.

[1] *Der Zweck im Recht*, p. 371.

Ihering corrects this by showing that the Law depends not merely on the force of the Sovereign who commands, but also on the sense of Right which is developed in each individual, and which in its totality represents a moral power which no Sovereign can despise, and on which Law ultimately rests.

He investigates also the security for the observance of Law by the Sovereign which exists in the regular administration of Justice, and enquires what boundaries are really to be placed to the limitation of the State power. Into these matters we need not follow him; but as to the latter it may be remarked that not even Law must be worshipped as an idol. This itself is merely a means to an end, and must give way when a higher necessity requires it. This, however, should take place, wherever it is possible, by a change rather than a violation of existing Law.[1]

Having thus examined the distinction between various kinds of laws, and clearly settled the marks of the positive laws which form, according to Austin, the appropriate subject of Jurisprudence, our next step is to consider the manner in which positive laws are made. This is done in the Lectures on *Law in Relation to its Sources*, the substance of which is briefly as follows.

In the first place, a distinction must be taken between two meanings which the word *source* in this connection bears. Thus the source of a law is either the immediate author of it, or it denotes the original

[1] *Der Zweck im Recht*, p. 418.

or earliest extant documents from which the substance of the law may be known. It is clear, however, that in this last sense the sources of laws are the sources of the knowledge of them, not of the laws themselves. Hence it is convenient to restrict the word to its first meaning; and when we speak of sources of law we refer to the authors or authorities from whom they immediately spring, whether these be a sovereign or subordinate legislature, a court of justice, the opinion of a jurist, or the custom of the people, supposing indeed that these latter be admitted as such sources.

We have next to consider two distinctions of the greatest importance, viz. one between the sources from which law proceeds, the other the manner in which it is made. Thus a law may proceed either directly from the sovereign, or it may be made by a subordinate legislature, with the permission, express or tacit, of the sovereign. In the former case it is said to be written law, and in the latter unwritten. Of course these terms are not related to their literal meaning, and it would probably have been better had Austin invented a nomenclature which would not have been thus directly misleading. We have, indeed, to distinguish between the words according as they are used in their grammatical or juridical sense. In their grammatical sense they have no meaning of any importance for the law of our own times, hence they may be always taken in the juridical sense as defined above. Austin gives a long and interesting series of examples of law of each of these kinds, for which we

may refer to the work itself.[1] It will be useful, however, to have the exact words in which he states this distinction:—

> Laws are distinguished, in respect of their sources or of their direct or immediate authors, into laws which are made directly and immediately by the supreme legislature, and laws which are not made directly and immediately by the supreme legislature, although they derive their validity from its express or tacit authority.[2]

The second distinction above referred to depends on the manner in which the law is made, for it may be made either *directly*, if the immediate purpose is the establishment of a rule, or *obliquely*, if the immediate purpose is the decision of a particular case.

It is Austin's object to show that of these two distinctions the second is the only one that has any real effect on law. Thus a statute made by a subordinate judge is just as effective as one made by the sovereign legislature, and will probably be much better; but it is of the greatest importance, so far as the substance of the law is concerned, whether it is made directly or obliquely.

We now come to a matter in which Austin is radically at variance with the views upon the making of law explained above. It is his contention that every law is necessarily the creation of the sovereign power. Thus he says:—

> Every Positive Law, obtaining in any community, is a creation of the Sovereign or State, having been established *immediately* by the *monarch* or *supreme body*, as exercising legislative or judicial functions; or having been established immediately by a *subject* individual or body, as exercising rights or powers of

[1] *Lectures on Jurisprudence*, ii. 530. [2] *Ibid.*

direct or judicial legislation, which the monarch or supreme body had expressly or tacitly conferred.[1]

It is clear that this is a fundamentally different position from that which Savigny adopts. Starting from this point of view, he proceeds to show that positive law cannot exist apart from the sovereign authority, however much it may coincide with custom or legal opinion or natural law. Into the course of this argument it will be necessary to follow him.

1. *Customary Law.*

The ground which he here takes up is just what we might expect. Until the sovereign power has added a Sanction to the custom it is no law, and as soon as this Sanction has been added it becomes a law made by the Sovereign.

Independently of the position or establishment which it may receive from the sovereign, the rule which a custom implies (or in the observance of which a custom consists) derives the whole of its obligatory force from those concurring sentiments which are styled public opinion.[2]

Hence, as it is only morally sanctioned, it can be nothing more than a rule of positive morality. It escapes from this condition and is established as positive law in one of two ways. Either it is adopted as a rule by a legislature, sovereign or subordinate, and is turned into law directly, or it is made the ground of a judicial decision, and is turned into law obliquely. In the first of these cases there is no doubt that it becomes Statute Law; in the second a

[1] *Lectures on Jurisprudence*, ii. 550. [2] *Ibid.* ii. 553.

difficulty has arisen, because judges in England have never till recently professed to make law openly, but have pretended to be merely applying a pre-existing customary rule. "And as the pre-existing rule which he appears to apply is apparently the *customary* rule on which he shapes the *positive*, the source of that customary rule, and the source of the positive law which he virtually establishes, are not unfrequently confounded."[1] If we follow Austin and find positive law there only where a Sanction is annexed, the distinction which he draws becomes perfectly clear. The legislator enforces his rule, and the judge his decision by a Sanction, hence it is from these authorities that the law proceeds. And if this Sanction is the one criterion which divides rules of law from rules of positive morality, it is quite clear, as he says, that those who do not adopt the above view "confound law with positive morality, and run into numberless inconsistencies which they cannot possibly avoid."[2]

Thus then, Law styled customary is not to be considered a distinct kind of law. It is nothing but judiciary law founded on an anterior custom.[3]

Since, however, this position, which is so clear to Austin's mind, has been by no means so clear to others, he enforces his opinion by specifying certain absurdities into which Jurists of the other school fall. Thus—

i. If custom is admitted as positive law at all, all immemorial customs are binding. But this is not the case.

[1] *Lectures on Jurisprudence*, ii. 554. [2] *Ibid.* [3] *Ibid.* ii. 555.

ii. If positive law exists by virtue of custom, it cannot be abolished except in the same way. But customary law often is abolished by Act of Parliament or by judicial decisions.

iii. Many of the so-called immemorial customs are about recent inventions, as for example, bills of exchange; but this is a palpable absurdity.

Now, without fully examining these allegations, I may point out that they seem to rest upon a misconception as to the nature of custom, and the relation which Customary Law bears to other law. Let us assume for the moment that Customary Law exists as positive law merely by virtue of the custom, and see whether these alleged absurdities really follow. We must first have some marks whereby to recognise the custom. Austin assumes that it must be immemorial, but this by no means follows. All we should require is that the custom has been followed so long and by such universal consent that people have learnt to decide their actions in accordance with it. Now *prima facie* every such custom, whether immemorial or not, is law. But, says Austin, some customs are recognised, others are not. It might, however, be just as reasonable to say that when Customary Law is not recognised, it is for some special reason repealed. This, indeed, brings us to the second so-called absurdity. Customary Law is not to be repealed save by the people who have established it. But what is the justification for this assertion? If we once admit that Custom and Legislation are each co-ordinate sources

of law, there is no reason why one should not be sufficient to repeal the other. The last absurdity is explained partly by what I have just said as to the time required for the establishment of customs, and partly by the fact that the judge is assumed only to declare custom and not to make new law. But a rule about bills of exchange, or any other modern rule of mercantile law, may either be taken by the judge from the custom of merchants, or it may be altogether invented by himself, and in the former case there is no absurdity in saying that it is a rule established by custom. I have thought it best to give this explanation of these so-called absurdities, in order to remove from this subject the prejudice which they naturally excite.

Austin returns after this to firmer ground when he brings forward the historical facts, that very often the people are not in a position to get their own customs observed as law by the sovereign, and that the customs which really are observed are introduced by no means with the consent of the people. This, of course, is perfectly true, but all it shows is that in certain states of society custom does not make positive law, and that Austin's ideas of Jurisprudence are adapted to a different state of society than that which is assumed by Savigny. We have here a confirmation of the historical difference between the two, to which I have already called attention.

2. *Jus prudentibus compositum.*

This is the same kind of law as that of which I

have spoken elsewhere as Scientific Law. Austin treats it in exactly the same way as Customary Law. It does not exist as law until the Sovereign, directly or indirectly, adopts it and adds a Sanction to it.

> Merely private jurisconsults, respected for their knowledge and judgment, are not *conditores* or founders of Law, although the weight of their opinions may determine *others* to found it. If their opinions determine the legislator, the influence of those opinions is a *remote* cause of the Law, of which the legislator himself is exclusively the *immediate* cause, or is exclusively the *source*.[1]

But the example by which Austin supports this shows that here, again, we must not forget the influence of circumstances. His legislator is Justinian, and he says that this emperor legislated sometimes by the advice of Tribonian, and sometimes under the influence of conjugal entreaty. But to show that at a particular period when legislation by way of Statute is specially active, there is no room for the law made by jurisconsults, and to assert that this has never an independent existence, are quite different things. At certain times, as we have seen, custom is not admitted to be law, and at certain times the opinion of jurists is not admitted to be law, but this does not prejudice their existence at other times, and a complete system of Jurisprudence may be required to find room for each as sources of law. Austin sums up his view of the two kinds in the following words:—

> The law introduced by judges on the authority of private jurisconsults, and the law which they make and mould upon pre-existing custom, are merely species of the same kind. Both are judiciary law, or law introduced obliquely; and the only

[1] *Lectures on Jurisprudence*, ii. 561.

difference between them lies in their causes, the opinions and authority of jurisconsults being a cause of the one, as pre-existing custom is a cause of the other.[1]

There are special reasons, indeed, why this source of law, if such we should finally determine it to be, has been overlooked in England. Owing to the overwhelming power of the Sovereign, judges had to exercise care in introducing new law. The most convenient fiction for this purpose was that they were merely declaring immemorial custom. Hence, whether they really adopted such customs, or followed the authority of Jurists, or made new law, they were equally sheltered by the same fiction. It is possible, however, that Austin in demolishing this fiction has destroyed the element of truth it contained, and has neglected to give due weight to influences which might have great effect in improving the Law.

3. *Jus naturale.*

Into the meaning of this expression, we have already examined; it is sufficient here to remark that, whatever it may be, it is merely a model to which positive law should conform; and even when it does conform to it, it is law not as being *natural*, but as being imposed by the legislator.

There are two passages in this place in which Austin forcibly asserts that the Sanction is of the very essence of positive law.

There can be no law without a judicial sanction, and until a custom has been adopted as Law by Courts of Justice it is always uncertain whether it will be sustained by that sanction or not.[2]

[1] *Lectures on Jurisprudence*, ii. 562. [2] *Ibid.* ii. 564.

And again, when he points out that the mere description of a custom for the sake of exactness does not make it law.

> The description, completion, and correction of positive morality are as much an end for which political government is wanted, as the obtaining, by its establishment, a more cogent sanction. But the Sovereign makes it law, not by the mere description, but by the sanction with which he clothes it.[1]

We have thus arrived at the result that all Law is, in the last resort, the creature of the Sovereign; that it is made immediately either by the Sovereign or by a subordinate, but that in the latter case it exists as law by the Sovereign's assent, either express or tacit; and it is made either directly by way of statute, or obliquely by way of judicial decision. These are decided to be the only modes in which law can be made, and hence it does not exist by virtue of being customary, or of being in accordance with legal opinion, or with natural law. These facts may be reasons for its adoption as positive law, but it does not become such until the Sovereign has adopted it in the manner above described, either immediately or mediately, either directly or obliquely. The next step, then, is to consider the relative advantages of the direct and oblique methods of making law, for it has been already remarked that the fact of its being made by the Sovereign immediately, or by the Sovereign only implicitly and by a subordinate legislative authority immediately, is quite immaterial;

[1] *Lectures on Jurisprudence*, ii. 567.

and this leads to a preliminary discussion of certain historical methods in which the law has been gradually improved. I have elsewhere emphasized the fact that legal rules must ever be adjusting themselves to the requirements of human relations. But where this has not been done by the Sovereign legislature, it has been commonly accomplished by the introduction of a certain department of Law known as Equity. In ancient Rome this was done by the Prætor, and the new rules took the form of Statute Law; in England it has been chiefly done by the Court of Chancery, and the new rules have taken the form of Judiciary Law. Hence Equity is regarded by Austin solely as one means of improving the law, and the particular method employed is a matter of history. I need not advert in this place to the more permanent meaning which I have attempted to give to this department of Law. It being settled, then, that Equity as a separate kind of Law does not require to be considered, the field is clear for a discussion of the relative advantages of direct and oblique legislation.

Without going into this question, which is very exhaustively and very clearly treated by Austin, we may say that the main distinction is as follows. The whole art of deciding a new case consists in bringing it under some established rule of law; when this rule of law has been made by way of statute, we have it at once ready to our hands. It is expressed in general and abstract terms, and we have nothing to do but to apply it. But when it is made by way of judicial decision, it is not thus ready to our hands; we have

first to collect it by a laborious method of abstraction and induction from the reported cases, and then proceed to apply it.[1] At first sight, then, it seems obvious that a system of law which is already expressed in abstract rules is far more useful than one which exists very largely in reported decisions. There are only two objections which can be urged to counterbalance this advantage. The rule of law if made once for all by statute, may be badly made, and whether it be bad or good at the time, it perpetuates the existing state of things regardless of the change of circumstances. The first objection, however, only holds on the supposition that there are no competent persons to construct these rules, or, in other words to make a Code, and is no objection to a Code in general. The second objection holds good with regard to all law which exists in a state where there is no adequate machinery for altering it. Thus there are many rules of judiciary law now existing in England which no judge would ever dream of disturbing. Hence it appears that the arguments in favour of a code in the abstract are unanswerable, and that the only question is how to ensure its success in any given case. For this purpose we require the encouragement of such legal education as will produce men competent to make a Code, and the invention of an effective system for altering it from time to time in accordance with actual requirements.

[1] See Prof. Pollock's essay on the Science of Case Law, *Essays in Jurisprudence and Ethics*, chap. ix.

CHAPTER XIV.

LAW AND MORALITY.

IT will be well now to consider generally the results at which we have arrived. Our labours have so far been devoted to a double object. I have tried to give an account of the actual rise and progress of Law, and I have exhibited the outlines of the Science of Law as they have been presented by the two leading schools of Jurisprudence of our times. The former attempt was directed to showing that Law has in its full course of development passed through three stages; the latter that there are two radically different ways in which, as a complete system, it may be represented. These results I will briefly recapitulate.

I. The first stage of Law is characterised by the following marks:—

1. Adherence to custom.
2. Community of interests.
3. The power of public opinion.

Hence we have concluded that such rules as exist are derived from an observance of actual practices; that these do not create Rights although they may impose Duties; and that they are universally observed with-

out the necessity for an actual legal Sanction. It has to be remarked, however, that so far there is no real distinction between Morality and Law. It is of the essence of Morality that it should be practically unalterable; but so long as all rules are derived from custom only, and so long as men do not conceive the possibility of departing from custom, all rules are alike unalterable. This stage then represents the beginning of Law when it has not yet dissociated itself from Morality.

II. The second stage of Law is characterised by the following marks:—

1. Abandonment of custom as the sole source of rules.
2. Rise of private property and division of interests.
3. Decay of the power of public opinion.

Hence we have concluded that rules are made no longer according to custom, but also according to expediency; that these no longer merely impose Duties in the interest of the community, but that they also regulate Rights which have sprung up with the general assent; and that they require to be sometimes supported by the power of the State. At this point appears the distinction between Law and Morality. The old rules, founded as they were upon custom, carried a feeling of necessity with them; the new rules, founded as they are, merely upon the opinion of certain people, have no such necessity, and it is felt that they are liable to change. The distinction,

therefore, now exists in germ, but it has to be further developed, and the provinces of Morality and of Law defined.

III. The third stage of Law is characterized by the following marks :—

1. The increasing division of interests, and the complication of human relations.
2. The increasing necessity for the making of rules.

Here then we have concluded that we require new organs of legislation, and that these are of two kinds : where a new rule is required to settle the conflicting interests of different classes, this must be made by an authority which has power to see them enforced ; hence we arrive at the idea of the Sovereign as a legislative authority : but where the rules do not involve a violent contest of classes, but refer rather to details arising from the complication above spoken of, they can be made to greatest advantage by persons versed in the Science of Law, that is, by the Jurists. Hence this third stage is marked by the rise of legislation in two forms—

1. Legislation by the Sovereign, or Statute Law.
2. Legislation by the Jurists, or Scientific Law.

Turning then to systems of Jurisprudence, we find that these are of two kinds, the one treating Law as a collection of rules for the guidance of the community, the other treating it as a collection of commands issued by a Sovereign to his subjects.

The results at which we arrived may be briefly presented as follows:—

I. *The German School of Jurisprudence.*

The external marks by which Law has been described, and by which it has been distinguished from Morality, viz. its expression by a judge and its enforcement by the State power, are more properly treated as consequences flowing from the nature of Law than as being constituent elements in that nature. If we look more deeply into the matter, and try to discern what is the very essence of Law, we find that no such separation between Law and Morality is possible, but that Law is subsidiary to Morality, and consists of such rules for the actions of men as make the realization of the conditions of Morality possible. These conditions have to be discovered from a consideration of the objects of society as a whole, and of the interests of the individual members of it. Whether, then, they are established in a scientific manner, or whether they are taken from current religious systems, the function of Law is, in the first place, to add such regulation as may be necessary for their observance. But since individual members sometimes refuse to obey them, and since the very existence of society is bound up with their maintenance, the same reasons which lead to their establishment lead us also to acknowledge that the force of the community must be brought to their assistance where necessary. It must never be forgotten, however, that the real basis

of support for rules of Law is to be found in the voluntary compliance of the people, and that laws are in general to be adjusted to the nature of men so as to secure as large an amount of this voluntary compliance as possible. When, indeed, resistance does take place and force has to be applied, we must again bring in this idea of adjustment, and remember that the general morality will be advanced by nicely apportioning the force to the case in question. It is the nature of men to act in accordance with laws, and it is the function of reason both to adapt the laws to human nature and to measure accurately the force which is necessary to secure their fulfilment.

It only remains then to consider the manner in which these laws are formed.

1. Originally they are made spontaneously by the people; not, indeed, as rules, for it is not in this form that they at first exist, but by uniformity of practice. In course of time, however, it becomes necessary to express them more visibly, and the chief organs for this are symbolical acts, and the judgments of popular tribunals.

2. But for several reasons it becomes expedient to have another and more direct way of making law; thus—

i. Customary rules often require exact and authoritative expression.

ii. A change in customary rules is effected with much difficulty if left merely to custom itself to effect it.

iii. The division and multiplication of interests often makes it impossible for customs to arise spontaneously.

To effect these purposes, then, legislation by the Sovereign is required. It is therefore the special province of legislation

i. To express customary law in an authoritative manner.

ii. To adapt old institutions to new circumstances, or replace them by new ones.

iii. To decide between rival interests.

3. But this does not exhaust the field of legislative activity. It is no longer possible for law to reside in the consciousness of the people on account of the complication of human affairs; but it is merely transferred to the consciousness of a particular class. Hence, just as in old times the people themselves made new law by a change of custom, so it is now the duty of the Jurists to make new law by a change of rules. A great part of this function has indeed already been assigned to legislation, but this only includes those cases where the change is either abrupt or affects rival interests. Wherever the law can be changed by gradual adaptation to new wants, or wherever details require to be worked out, this is properly done by the Jurists. This, however, is only the creative part of their work; they have other functions besides. Thus the general arrangement of the whole law is a task of no little difficulty and one which properly falls to the province of Scientific Juris-

prudence. Moreover, law, as declared by the Sovereign, passes to the jurists to be interpreted, and here their labour becomes in a way creative again.

Hence the work of Science may be arranged as follows:—

i. Purely creative; as in making new rules.
ii. Purely scientific; as in arranging the law.
iii. Intermediate between the two; as in interpreting Statute Law.

II. *The English School of Jurisprudence.*

Here we begin with a definition of Law; and positive law, with which Jurisprudence is concerned, has to be distinguished from all other kinds of laws. We discover, then, that a Law is a species of Command; that it must be supported by a Sanction, and that it imposes a Duty. Moreover, positive law is distinguished from other laws in that it is set by a political superior to a political inferior. This leads to a definition of the terms Sovereign and Subject. Hence we have the nature of a law unfolded by the allied terms—Command, Sovereign, Subject, Sanction, Duty. Opportunity, however, has been taken of the mention of Divine Law to determine the mark by which it may be known; and as this is said to be the pattern to which positive law should conform, we have learnt not only what positive law is, but also what it ought to be. Our science of Jurisprudence, then, in spite of Austin's assertion to the contrary, is made to include the consideration of Law in both its aspects, real and ideal. It is an easy transition after

this to a discussion of how law is made. From the definition above given it must proceed in the last resource from the Sovereign; hence the first distinction depends upon whether it proceeds from him directly or indirectly. This, however, is of no practical importance, and our attention is rather directed to the manner in which law is made. Thus the immediate purpose of the law may be the establishment of a rule; in this case we have direct legislation or Statute Law: or the immediate purpose may be the decision of a case; here we have oblique legislation or Judiciary Law. But as the nature of this has been often mistaken, we are told that certain so-called sources of law are not sources really, but only reasons which lead to the making of law in one of the above ways. Thus custom, the opinion of lawyers, and natural law, are not in themselves sources of positive law. This is often founded upon them, but it becomes positive law by the decree of the Sovereign, or the decision of the judge.

We have also noticed that upon Austin's theory the Sovereign is not bound by the Law, because *binding* implies *superior force*. This, however, is in general contradicted by the usages of civilised societies, and we have seen that Ihering does not admit that Law has attained its full development until it has become practically binding alike on Sovereign and Subject. This bilateral obligation is secured partly by the selfish fear of the Sovereign combined with the feeling of Right that grows up in the community, and partly by the guarantees implied in the regular administration of Justice.

From these two systems, and from all that has preceded, I shall now attempt to extract those ultimate ideas upon which the Science of Jurisprudence may most properly be made to rest.

Rules of morality and rules of law are alike concerned with controlling the actions of men. In entering, then, upon the science which deals with the latter, we must first consider in what relation these two stand to each other. Austin distinguishes them by the Source from which they proceed, and the Sanction by which they are enforced. I shall try to accomplish the same task by considering the departments with which they respectively deal.

Society is composed of individuals who are endowed with energy, and who are capable of pleasure. I suppress the mention of pain here, and in what follows, because it may be regarded as negative pleasure, and the sum-total of pleasure consists in the balance of positive pleasure over pain. Now the ultimate object of all rules is to secure to each individual the largest amount of pleasure, and as this in its turn depends chiefly upon the amount of energy that can be called forth, we may say that the immediate object is, as a rule, the development and advantageous employment of energy. A little consideration will make this clear. Let us enquire first in what energy and pleasure consist. The energy of a person is of various kinds, and may be conveniently classed as physical, mental, and emotional. All that energy which results from a robust body, and from bodily training, is called physical; all that which

results from the development and education of the intellectual powers is called mental; and all that which results from a proper condition of the feelings is called emotional.

Pleasure again consists—

1. In the mere possession or employment of energy by ourselves or others.
2. In the material results obtained by the employment of energy.
3. In the use of things which can be obtained without the expenditure of energy.

But as this last class includes but a small portion of the whole pleasure enjoyed by man, it will be safe to say that this varies directly as the energy that is applied by individuals. The object of all rules may then be said to be twofold—

1. To develop and apply energy — physical, mental, and emotional.
2. To divide among the individuals the sum-total of pleasure thus obtained.

We shall find that up to the present time rules have been content to attain the first object; the second has in general been left to attain itself.

Let us consider, then, briefly the rules which have been discovered for developing and applying individual energy. These are of various kinds; thus we have—

1. Rules designed to develop and maintain energy.
2. Rules designed to call energy into action.

3. Rules designed to promote the effectiveness of energy.

We must distinguish, moreover, according as the rule is addressed to the individual whose energy is in question for his own guidance; or to others in order to determine their conduct towards him. We may then treat of these rules in order.

1. Rules designed to develop and maintain energy.

a. Physical energy.

i. Those addressed to the individual.

These include all rules which have for their chief object the maintenance of bodily strength; hence they include in particular the rules which inculcate the virtues of temperance and chastity.

ii. Those addressed to others.

Such as forbid assault, murder, or other bodily injury.

b. Mental energy.

i. Rules addressed to the individual.

Those which enforce diligence in the cultivation of the mental faculties and in the acquisition of knowledge.

ii. Rules addressed to others.

As mental energy can hardly be injured by the acts of others no rule need be specified here.

c. Emotional energy.

i. Rules addressed to the individual.

As it is by the emotions that men are chiefly guided it is important that these should be of a right kind, and should exist in great strength. In

particular, the special emotion known as the approval of conscience ought to regulate the whole actions of the man. It has been commonly held, though, that the emotions depend more upon the circumstances in which an individual has been placed than upon his own will; the rules, therefore, which exist on the subject are very vague. Their general object is to restrain the individual from putting himself in circumstances in which the emotions will lose their purity or their force.

ii. Rules addressed to others.

These forbid all actions which tend to corrupt or destroy the right emotions in others.

So far we have considered the individual as able to maintain and develop his own energy; but this is far from being universally the case. We have therefore to consider further some subsidiary rules. These are all addressed to others on behalf of the individual, and they differ from the previous rules of the same kind in that while those required forbearances only, these require acts. The most important case in this connection relates to children. Thus they require to have their faculties physical, mental, and emotional developed and trained by others, and in seeking who these others shall be, numerous reasons concur in pointing out the parents as the most suitable persons. We may arrange this and other cases as follows:—

Rules for the maintenance and development of energy in individuals who require assistance.

a. Children.

Rules which require the parents to afford them proper physical, mental, and emotional training.

b. Aged people.

This is the converse of the last case. The children in like manner are required to give physical support to aged parents.

c. Adults.

There is a moral rule requiring charity to be given to alleviate physical want, and we see the germs of similar rules, with regard to mental and emotional wants, in various efforts of the present day.

2. Rules designed to call energy into action.

Rules of this kind are direct and indirect. A direct rule is that which inculcates diligence and forbids idleness; this, however, has never yet been found sufficiently efficacious, and it is enforced indirectly by the institution of private property. The foundation of this is the principle that each man shall have the results of his own labour, and the institution is maintained by the rule against theft.

3. Rules designed to promote the effectiveness of energy.

Here we have two conflicting principles. It has been abundantly shown that individual energy is most effective when it is allowed

> to develop and exert itself in its own way; at the same time, in nearly all departments of labour, it is necessary that individuals should combine together, and that one should render services to another. These requirements are reconciled by allowing each individual full freedom before entering into a contract, but enforcing its performance when once entered into. Hence we have the moral rule enforcing fidelity between individuals in their engagements.

The rules which I have so far laid down are designed to develop as much energy, and consequently obtain as much pleasure, as possible. We have still to consider those rules which relate to the distribution of this pleasure. A large part of it we at once see is already disposed of. Thus it is impossible to distribute pleasure which results from the bodily health of an individual. The amount of pleasure which really can be distributed is of two kinds. It consists in things and in acts, or, to use Bentham's term, in services. It must be noticed that the services here mentioned are such as are in themselves sources of pleasure, and not meant merely to procure it; of these latter I have spoken just above. The object, then, is to devise rules by which the pleasure to be derived from things and from services may be distributed among the community. We will consider these in order. There is no doubt that inasmuch as pleasure often consists in the satisfaction of want, the greatest sum

of pleasure for each individual would be obtained if a distribution was made according to the wants of each. This, however, has never been found possible in practice. The nearest approach to it is the principle of equality, and this, as I shall immediately show, is but rarely appealed to.

1. Distribution of things.

This is already practically settled by the consideration specified above. The energy of each individual is only fully evoked if he has himself the fruit of his labour. This principle lies, then, at the base of the distribution of property, and there is little room for any other to be introduced. Sometimes, however, when we have satisfied this we appeal to the principle of equality. Thus the estate of an intestate is divided equally among the children. It is restricted to the family, for this represents the original owner; it is divided equally, for no one child has a better claim than any other. It is probable, however, that neither of these principles, that of giving each man the fruit of his labour and that of securing equality of distribution, has yet attained its final position.

2. Distribution of Services.

This is determined entirely by the principle of free contract laid down above. The acts are personal to the individual; he will not train himself to perform them unless he has full control over them. Hence he distributes the benefit of them amongst others in the way he pleases.

Thus we see that the distribution of pleasure rests chiefly on the one principle, that each man shall

reap the reward of his own energy; and when this becomes incapable of application it is supplemented by the principle of equal division.

Starting, then, from the fact that society consists of a number of individuals endowed with varying energies and capable of various pleasures, and from the principle that the object of all actions should be to secure, by means of these energies, the greatest amount of pleasure, we arrive at the foundation of rules of morality, and see how a natural classification of them suggests itself. A little further consideration, too, will show us the proper province of positive law. It must be noticed that I am assuming for the present, that rules of morality are observed without the necessity for a legal sanction, whether the individual be actuated by fear of man, or fear of God, or by his own sense of rectitude. It will be time enough, later on, to discover how these can be further enforced. I now wish to determine the domain of positive law, on the supposition that it consists of rules not of commands, and that these require no legal sanction to enforce them. The position I am taking up will be at once apparent, if we observe that all the rules of morality may be assumed to be known, and yet that the best disposed individual may often be in doubt as to how he is to observe them. The rules of law, then, are intended to supply that information which is essential to be known before the rules of morality can be observed. When we say, generally, that theft is forbidden and contracts are to be fulfilled, we by no means make the path of duty clear. The questions arising from the

complicated division of property, and from the different degrees of strength attributed to agreements, as well as from other matters connected with them, call for some definite regulation. With the greatest regard for private property, we must still have rules for its division, its assignment, and its devolution; and with the greatest respect for agreements, it is necessary to separate hurried and perhaps provisional promises from such as are entered into deliberately. Apart, then, from the question of whether Law requires a sanction or not, we find that it has a proper and permanent sphere in the regulation of property and contract. But this is not all. I may be quite unwilling to violate Morality by inflicting wilful injury on my neighbour, and yet I may unwittingly do so by a neglect of sanitary precautions.

Hence we see that to each of the great rules of morality which protect the person, the property, and the contracts of the individual, we have a whole department of positive law added in order to supplement them and make their performance possible.

We saw, moreover, that in addition to those moral rules which require forbearance from interfering with the individual, there are others which impose the duty of lending him active aid. But since it is difficult to secure this object by private charity merely, experience shows that these rules may properly be carried into effect by the State and the cost apportioned among the members of it. Hence we have the whole system of Poor Laws, of Education Laws, and of Ecclesiastical Laws, ministering as they do to the physical, the mental, and the emotional requirements of the people.

Of course the possibility of dispensing with a Sanction as regards these rules of law springs from the desire of each individual to obey the great moral rules. The rule against theft includes also a rule enforcing an observance of legal regulations regarding property: the rule inculcating fidelity and truth includes the observance of all legal rules as to the fulfilment of contracts. The rule forbidding injury to another includes the compliance with all legal regulations affecting the health of the community. Hence so long as the various influences that work upon the individual are such as to incline him to keep all the moral rules, he will keep all the legal rules as well, provided, that is, that he has confidence that those who enact the legal rules are fitted to do so. In this case we have Morality and Law existing side by side, and their domains are perfectly distinct.

It must be remembered, however, that these do not exhaust the actions of mankind. Of these some are governed by the moral rules, assisted, as I have shown, by the legal rules; but there remain over and above a vast number of actions which are classed as indifferent. In these the individual has to calculate directly the advantages and disadvantages to himself and others of a proposed line of action and to decide accordingly. While, then, utility is the ultimate test of all actions, it is the immediate test of only the last kind.

Thus we see that the rules of morality concern large classes of actions which affect powerfully the welfare of humanity; they are arrived at by the

gradual experience of the race, assisted by those far-seeing intuitions of great moral teachers, which are the highest marks of genius: at a later time Science comes in and, as a rule, ratifies them. The rules of law, again, strive to bring order into the complicated relations of human beings, so far as their property, their contracts, and other interests suitable for legal regulation are concerned. They do not interfere with the rules of morality, but simply provide a clear field within which this last may work. I am perfectly willing to observe the rights of property belonging to others, but I must first know what these are; and to fulfil my contracts, but I must have the effects of these, so far as they concern various parties, determined. A rule of law is determined at first by the experience of a small part of the human race, and is embodied in custom; it is afterwards collected from decisions founded upon the direct sense of what is right; it is then declared by statute according to principles of justice or expediency; and it is finally taken up by Science, and adapted more and more to the necessities of life.

It may be said, indeed, that men are connected with their fellows not only in matters which are regulated by law, but in many other ways. Thus the business which an individual takes up affects not only himself but the community at large; why not then subject this to legal rules? Of course these matters have been in the past subjected not only to legal, but also to moral rules. Where distinctions of caste have arisen out of trades, and where it is

immoral to lose caste, the occupation of the individual is determined by moral rules; and where the home of a labourer is determined by law, and it is illegal for him to change it, there his occupation is governed by legal rules. But the sphere of legal and moral rules is continually changing. That which is determined by Morality in one age, is determined by Law in another, and in a third is left to the discretion of the individual. The result of experience is that the energy of the individual, and therefore the welfare of the community, is best developed under conditions of freedom. Hence such matters as the above speedily pass out of the domains both of Morality and of Law, and are left to the individual will. The rules of morality are made as few and simple as possible. An individual of good character will observe them because of his natural disposition and because he is acquainted with them. But the complexity of the relations that arise with the increase of society is such that the individual has not the requisite knowledge to see his way. Human affairs cannot go on unless some one steps in to decide the matter. Where, then, immediate knowledge of rules fails, the province of Law begins. It is, however, only introduced where grave evils would follow from the absence of it. The necessity is first felt with regard to property. Here, unless fixed rules are introduced, quarrelling and bloodshed will soon arise. When, again, Law first takes contracts in hand it does nothing more than enforce a rule of morality; but as the mercantile relations of men increase in complexity it goes much further. In

the modern world many cases arise in which all parties are anxious to fulfil a contract, but they want to have a rule as to the many interests affected by it. Beyond this, however, the liberty of the individual is not fettered, and though in everyday life we have cases of the greatest difficulty and affecting many interests, yet since in these there is no such necessity for uniformity of decision as in property and contract, the Law refuses to interfere, and the matter is left to the discretion of the individual.

Even, then, before there is any necessity for a legal sanction, we are able to assign perfectly distinct spheres to Morality, to Law, and to the individual will. So long, indeed, as Morality and Law exist in custom only, it is difficult to distinguish them, but when once they come to be expressed as rules, the distinction which I have been pointing out begins to be apparent. We may sum up these results, then, as follows:—

1. There are certain classes of actions which affect directly and obviously the welfare of the individual and the community. These are governed by a few simple rules which every man may know. These are the rules of morality. Owing, however, to the complications which arise from the collection of individuals in large societies, it often becomes impossible to know how to act in accordance with these rules; hence we require a large number of subsidiary rules to be laid down. These are the rules of law.

2. There are other actions whose effect upon the community has not yet been decided, either because it is impossible to classify them, or because opinion is divided upon the effect of any given class. These, therefore, are left outside the domain of rule entirely; they are governed solely by the discretion of the individual.

An example will make this division clear. A man builds a house and introduces a new system of drainage. If he lives in the country, this is a matter which probably is left entirely to his own discretion; but if he lives in a town, we now have to consider how this will affect others. It is known that the system of drainage has a direct effect upon the health of the population, hence it is a matter which cannot be left to the individual's discretion. As he may be injuring his neighbour's health we must get the best opinion possible as to how this is to be prevented, and this opinion the system of sanitary laws in force in the town ought to represent.

The whole matter, then, may briefly be put as follows. When we consider all the actions of mankind the tendency of certain large classes is seen to be beneficial or the reverse; the tendency of other large classes has not been ascertained, and we have a vast residuum of isolated actions which cannot be classified. Actions of the first class are accordingly governed by moral rules; actions of the second class are left to individual discretion. Of these moral rules some demand forbearances from interfering with others;

some demand active aid in support of others. We may, therefore, divide them into moral rules requiring forbearances and moral rules requiring acts. It must be noticed, however, that this distinction is not exact if carried out into details; thus the rule which requires me to forbear from injuring my neighbour's health may require the doing of a certain act, as the laying down of a drainage pipe. Many of the moral rules, again, requiring forbearances cannot be fulfilled properly until exact knowledge is obtained as to the effect of certain acts, or until the relations between individuals have been defined; and many of those requiring acts must either be supplemented by similar knowledge or else can only be properly performed by means of combined action. Hence we have the following arrangement of the different departments of law:—

1. Rules requiring forbearances.
   - *a.* As to health. Sanitary Law.
   - *b.* As to property. Property Law.
2. Rules requiring acts.
   - *a.* Acts of individuals alone. Contract Law.
   - *b.* Acts of individuals in combination.
     - i. Poor Laws.
     - ii. Education Laws.
     - iii. Ecclesiastical Laws.

Moreover, now that we have introduced law and combined action, we must have means by which the law may be made and ascertained, and an organisation by which combined action can be carried on; this leads us to the formation of the State with its legislative, judicial, and administrative functions. All these are

subjects for regulation, and hence we obtain the system of rules known as Constitutional Law.

We have thus defined the province of Law, and divided it into various departments, without adverting to the ideas of Command and Sanction, and the only idea which we have introduced is that the affairs of society require in many points regulation. We suppose, then, that the rules thus formed are obeyed by the community naturally, *i.e.* without the necessity for a legal sanction, but as this state of things is a mere abstraction, being arrived at only by dropping many of the facts of real life, it may be proper to contrast it briefly with the abstraction used by Austin. At the basis of his system of Jurisprudence he places, as we have seen, a Command issued by a Sovereign to his subjects and enforced by a Sanction. The objection to this is that no Sovereign in a modern community is able to enforce his commands if the Sanction has to be called in to his assistance frequently; if, that is, the number of people who only obey his command through fear of the Sanction form a considerable portion of his subjects. The idea which I am suggesting in place of the above is, that a law is a rule explanatory of a rule of morality, ascertained by proper authority, and resting upon the assent of the community. The objection to this, on the other hand, is that no law is safe if left merely to the assent of the community, but that to produce security it is necessary for it to be enforced by a Sanction. The element of fact, then, which Austin drops in order to arrive at his

abstraction is, that the power of the Sovereign is limited, and that Law rests really upon the assent of the people; the element of fact which I have dropped is, that Law cannot be maintained universally without a Sanction, and that it is not always coincident with a rule of morality.

The following reasons may be suggested for preferring this abstraction to the former:—

1. It represents a state from which Law originally sprang, and to which with the advance of civilisation it tends to return. Austin's abstraction corresponds closely to certain historical conditions of Law, but as the desire for conquest dies away, nations more and more recede from this condition. So far, then, as an abstraction can have any influence on the progress of Law, Austin's is to be rejected, because it approaches more nearly to truth as the condition of a nation recedes in point of order and civilisation.

2. It approaches closely to the idea upon which German jurisprudence rests. The State is, indeed, a regulative power, but its sanction is not an essential point in Law, any more than physic is essential to health of body. We may say, continuing this metaphor, that Austin's abstraction supposes a permanently unhealthy condition of society. The one which I am suggesting supposes a healthy condition to start with, and only introduces a correction where the contrary is the case.

3. It has always been felt as one great objection to Austin's system that it denies any position to International Law as such. By the abstraction I am

suggesting, this objection is done away with. There are, indeed, rules of morality simply which must be observed by nations if peace is to prevail, but, apart from these, there are many matters of property, of contract, and of administration, which require to be governed by positive rules. These form the proper subject of International Law.

4. Although we are not directly concerned here with questions of Morality, yet it may be proper to point out that Austin's use of this term is open to the gravest objections. A mere conventional rule upon a frivolous matter of etiquette cannot, except by an absurd misuse of language, be called a rule of morality, and any definition which makes this necessary is open to the charge of classing things according to mere external marks without any regard to their essential nature. Rules of morality are those rules upon whose observance depends the very existence of the individual and society, and it is to explain and enforce these that Law exists.

It may be difficult to bring all legal institutions under rules of morality in the way I am suggesting; and, in particular, there are many rules which are merely meant to secure due order in the numerous relations of a populous community. This fact, however, will constitute no infringement of the principle if we remember that this very order is one of the first conditions of the welfare of society. I do not pretend to have given more than a sketch of the matter, but I think there is at least some value in a theory which regards Law as springing from and realising

Morality, and which must therefore tend to bring it more and more into harmony with the opinions of the people.

The question of the Sanction as being a constituent element in Law has been recently alluded to by Sir Henry Maine. I have said enough elsewhere about the necessity that gradually arises for organising the State power in order to enforce the Law, and, of course, it is denied by no one that Force must always be at hand when it is required. It will be clear, however, from all I have said, and from the prominence which I have assigned to the views of certain German Jurists, that I am unwilling to look upon force "as the motive power of Law."[1] That it is so at certain times, times of conquest and disorder, is certainly true, but I am inclined to regard this as exceptional and as by no means guiding us to the correct view of its proper function. We are told, indeed, that "the great difficulty of the modern Analytical Jurists, Bentham and Austin, has been to recover from its hiding-place the force which gives its sanction to Law. They had to show that it had not disappeared and could not disappear; but that it was only latent, because it had been transformed into law-abiding habit."[2] But I cannot help agreeing with the view I have above quoted from Ihering, according to which he does not consider Law to have existed in its true form until this law-abiding habit on the part of both Sovereign and Subject was formed. That in the course of this formation Force came often

[1] *Early Law and Custom*, p. 388. [2] *Ibid.*

to the front, and Law frequently took the shape of a mere command, is true so far as the historical development of Law is concerned, but there is no need to retain this position for Force when Law has once arrived at its proper height. It must not be forgotten, too, that Force has been rendered necessary no less by unjust laws on the part of Sovereigns than by illegal acts on the part of Subjects. The question, indeed, is merely this:—every abstract idea of Law must drop some of the facts of life; shall we adopt one, then, which will exercise a continually depressing influence on the real value and position of Law, or one which represents an ideal to which all civilised communities have, with some closeness, approximated? For my part, I have no hesitation in adopting this latter course. It is for history to show how Force has gradually become subject to Law, but when this has once been effected it is important so to define Law as to place it in a position of authority, using Force sometimes of course, but only as its servant and for the sake of securing its realisation where necessary.

It will not be denied, indeed, that the great security for all Law is that it rests upon the general assent of the community. It may require a legal Sanction sometimes for its enforcement, but without this general assent it cannot, as a rule, even exist.

CHAPTER XV.

THE SOURCES OF LAW.

THE next point, then, is to discover how this general assent as to Law, of which I have just spoken, can be ascertained, and here we at once come upon what seems to German Jurists the original, and in the last resource the only proper source of Law. The general assent of the people cannot be better ascertained than by their common adoption of the same practices; hence the first object of Law is to observe these common practices and express them in rules; in other words, Custom is the original source of Law. We cannot, however, adopt this position without accounting for the special reasons which led Austin so decidedly to reject it. These may be seen partly in the idea upon which he founds all Law, and partly on the special circumstances attending English Customary Law. Thus, if every law is to issue from the Sovereign, it is clear that a custom cannot be law until it has obtained the Sovereign's express sanction, either by way of statute or of judicial decision. Again, the actual decisions of English judges, although they pretended to be founded on custom, yet were, as a rule, made in a very different way. We need

only point to the complete disturbance of ancient custom which was effected by the Norman Conquest.[1] Custom, after this, was not adopted by the judges as law merely as being custom, but in those cases only where they saw no reason to refuse validity to it. It must be remembered that custom can only be a source of law when it affects a homogeneous community, or portion of a community; as soon as conflicting interests arise its power is gone. But the Norman Conquest broke up what homogeneity prevailed among the Saxons. A judge had now to consider whether the custom by which he was asked to decide conflicted with the interests of the conquerors, and if so, he probably replaced it by a rule of Norman law. Only in the case of its affecting the subject race merely was there any chance of its being adopted. So great, nevertheless, was the respect paid to custom as a source of Law, that it was long held to be the only source from which judge-made law was taken, and a rule of Roman law, taken secretly from the Digest, was only held valid on the supposition that it embodied ancient custom. The real objection to custom as a source of law need not, then, go the length of abolishing it altogether, although, as a matter of fact, it has never been properly a source of law in England. But this is merely due to the fact that Law in England has so nearly approximated to Austin's idea of it; it has really been the Command of a Sovereign supported by a Sanction, or rather it

[1] Perhaps, however, this was not so great as I have assumed. See Pollock's *Essays in Jurisprudence and Ethics*, p. 215.

was so at the time when Customary Law would have been chiefly useful; for it must be remembered that this is only a possible source of Law under certain conditions, and in modern communities these conditions are almost entirely wanting. We may, indeed, still discover customs affecting particular places or particular classes, but it is quite impossible for a customary law now to grow up throughout a nation. Finally, we may say that if we allow Law to be a rule made by competent authority, and resting upon the assent of the people, nothing can be clearer than that the most competent authority is the people themselves, and hence Custom is the original and at certain times the best source of Law. It may be hard, perhaps, to shake off the idea of Austin that a custom cannot be law till expressed to be so by a tribunal, but when we remember that it proceeds not from the Sovereign but from the people, we see that the tribunal has no other means of knowing the law than any one else. We must, indeed, have some marks by which to distinguish custom; it must be observed with a certain amount of universality and for a certain time, but when these are determined, it can be a rule to guide the conduct of men just as much before it has been acted on by a tribunal as afterwards.

The fact, then, is, not that custom is no source of Law, for where the history of a race has not been disturbed by conquest it is its original and proper source; but that, as the people increase in numbers, it becomes an inconvenient source of Law from the

difficulty of determining it, and, as they become more separated in interest, it becomes, in general, an impossible one from the difficulty of a spontaneous reconciliation of these interests. We have, therefore, to enquire in what other way rules of law can arise which shall rest upon the assent of the people, and, following Savigny, we find that we must have recourse to Legislation or to Science. Let us enquire, then, what these mean. It will be convenient to consider law-making as of two kinds, each of which has its origin in the failure of customary law on different grounds.

1. Custom may fail to establish a law on account of the conflict of interests. Here the most natural course is to allow to all interests due weight in a common assembly, and to decide after a consideration of the balance of advantages.

2. Custom may fail to establish law on account of the complication of interests. Here the most natural course is to entrust the making of law to persons possessing the following qualifications :—

i. An exact knowledge of the interests involved.

ii. A practical acquaintance with the wants of the people.

Rules of Law made in the former manner are made directly by the Sovereign. Rules of law of the latter kind are made directly by Jurists.

As soon, however, as we take the making of law out of the hands of the people themselves, there is a possibility that the result may not obtain their general assent. For it will be seen that law-making,

whether by the Sovereign or by Jurists, will now have one of the following objects:—

1. It may be merely an attempt to express clearly the actual practices of the people. Here it only pretends to declare custom.

2. It may be an attempt to effect changes which are indeed desired by the people, but the details of which have to be discovered. Here the object will be to divine as correctly as possible those rules which, when put into practice, will win the assent of the people.

In this latter case there must be some principle upon which the making of new laws is to proceed; but this can only be derived from a consideration of what is that quality in old laws which has won for them general assent. Ancient jurists, if the question had been put to them in this form, would have replied that it was their conformity with the Law of Nature; of the real meaning of this as a principle I have already stated my opinion. Modern enquirers, on the other hand, will say that it is in virtue of the fact that they have apparently secured the greatest happiness for the greatest number. It is upon this principle, then, that Law must be made when we have to divine beforehand how to win for it the assent of the community.

Before carrying these ideas any further it will be well to consider two disturbing influences in connection with law-making. We have seen that all actions are either governed by moral rules or left to the discretion of the individual; and, moreover, that

the moral rules often require to be supplemented by rules of law; these are really of the nature of rules explanatory of rules of morality. We may say, too, that the rules of morality, so far as we can see, are customary rules proper; for whatever may be their actual source, they derive their real validity from the fact that they commend themselves to the good sense of the community. It is not denied, of course, that in some cases the Morality of a community is imposed by commands, in the same way as is sometimes the case with Law, but this seems to occur only by way of exception. Rules of law, again, so far as they arise by custom, are hardly to be distinguished from the rules of morality which they explain; but when, later on, they are produced by Legislation or by Science, we see that they also derive their real validity from the fact that they satisfy the general wishes of the people. There still, moreover, remains the sphere of individual discretion which is outside the domain of Law entirely. I shall now examine the changes made in the condition of Law by the following disturbing facts:—

1. There are many individuals who fail to observe the ordinary rules of morality.

2. There are Sovereigns who have other objects in view than to frame laws which shall win the general assent of the people. These objects may be—

i. Selfish. Here they wish to secure benefits for themselves at the expense of the people.

ii. Benevolent. Here they cannot trust the people

to know what is best for their welfare, but lay down laws according to their own ideas.

A Sovereign of the former class is usually known as a tyrant; one of the latter as a paternal despot. I need hardly remark that I use the term *Sovereign* as defined with so much care by Austin.

The first of these considerations leads us to the whole department of Criminal Law; the second shows us Law as deviating from that quality which we have attached to it, conformity with popular opinion. Of these, then, in order.

1. I have already enumerated the chief rules of morality, and we have seen that they are founded on general practice. When, therefore, the State power has to be called in to assist any of these, it makes no new rule, it simply adds a sanction to an existing moral rule. Hence we see that Criminal Law is altogether adjective; it provides means by which violations of certain moral rules may be discovered and punished, but it does not add anything to the moral rules themselves. It is, however, a very important part of the Science of Legislation to determine which of these rules ought to be thus enforced, and in this connection we have to notice two points:—

i. Is the moral rule received with sufficient generality?

ii. Is it expedient to enforce it with a Sanction?

In considering the first we must avoid a possible mistake, for a moral rule may be properly enforced

if it is accepted only by the vast majority of the people, since it may then be said to rest upon their assent. Thus the moral rules which we are now considering correspond to a certain extent with Austin's rules of positive morality; it is not necessary that they should be accepted by every one, but it is necessary that the minority who reject them should be so small as to be practically insignificant.

As to the second, there is a well-known distinction which is usually allowed to have much weight. The violation of certain moral rules does immediate harm to other persons than the violator; these are properly enforced by a legal sanction. The violation of other moral rules does harm immediately to the violator and only indirectly to others; as to these there has been much doubt, and till recently the tendency has been to leave them to the ordinary sanctions of morality upon the following grounds:—

a. They are of such a nature that their discovery and punishment is frequently very difficult.

b. Since the general interests of morality are best advanced by leaving individuals to some extent at least to their own discretion, it is clear that this is most conveniently done when the immediate harm due to the violation of morality falls upon themselves.

2. We have next to consider those variations in Law, as defined above, which are due to a selfish or to a benevolent Sovereign.

Now assuming that Law in its normal state is known by the mark of conformity with popular

wishes, and that the three possible provinces of Law are morality, law, and discretion, as defined above, we find that the abnormal laws made by a selfish Sovereign belong more to the domains of law and discretion; those made by a benevolent one to the domains of morality and discretion. Thus a selfish Sovereign arranges the law of property to suit his own interests, and invades the sphere of discretion to stifle the spirit of liberty, while a benevolent Sovereign enunciates what he conceives to be superior rules of morality, and clothes them with a sanction, in order to raise the manners of the people, and issues rules controlling their discretion for the sake of guiding them. It is clear that all such laws rest upon the fear of the sovereign power, and it is because actual governments have so often been of the former kind that Austin made so much of the Sanction as an indispensable part of Law. I have, however, tried to show that this is only necessary—

i. In case of exceptional defect in the individual.

ii. In case of exceptional variation in the nature of law.

In the former case the sanction is necessary in order to control an evil-disposed individual.

In the latter case, the sanction is necessary in order to control a well-disposed individual for one of the following reasons—either,

a. A new rule of morality is laid down contrary to his own idea of what is moral; or

b. A new rule of law is laid down which seems to him subversive of the principle on which

the corresponding rule of morality is founded; or

c. A new rule of law is laid down which merely controls his discretion.

It is not, of course, asserted here that a benevolent government is in itself bad, though this may certainly be affirmed of a selfish government. The whole tendency of legislation at present, however, is to remove those anomalies in the law which have been imposed by selfish governments in the past, and the question now is rather as to the advantage of benevolent governments. I have laid down the principle that Law in its normal state conforms to the wishes of the people; and that, as a rule, a new law will satisfy this test if it secures the greatest happiness for the greatest number. It is quite possible, however, that a people may not at once perceive what is for their greatest happiness; in this case the wisdom of abnormal legislation by the sovereign will depend upon the following considerations :—

i. The probability that the sovereign is really wiser in this matter than the body of the people.

ii. The evil that will ensue from the extensive enforcement of the law by sanctions.

iii. The damage that will be done to the permanent character of the people by an interruption in its free development.

It must be noticed that when we speak of a benevolent government the term is simply a relative one. Every government, it may be said, ought to partake

of this nature, and I use the term to denote one which professes to be very much in advance of the people. Thus the British government, with reference to India, is a benevolent government; with reference to England, a popular government. It is to be noticed, too, that the mere attempt to enforce acknowledged rules of morality does not constitute a benevolent government, though it may be a mark of unwise legislation. Thus, in promoting temperance by law the government does not act as a benevolent government, for temperance is universally acknowledged to be a virtue. The only question is whether this is the best way of permanently elevating the character of the people. But if it were to enforce total abstinence by law, the government would then really act as a benevolent one, for there is no generally received rule of morality which enjoins this. A change in the law will almost always, indeed, be opposed to the wishes of large numbers of the people: its justification lies in the speed with which these come to acquiesce in it.

This method of stating the matter seems to me to show clearly, that so far from a Sanction being essential to the nature of Law, it is, if not an accident, at least a mark of the second order, and the necessity for it is gradually removed in the following ways:—

1. By raising the character of individuals who are by circumstances naturally predisposed to crime; hence the importance of preventive measures.
2. By bringing the Law continually into harmony

with the opinions of the people, so far as this is consistent with other considerations which must have weight with the Sovereign.

The results at which we have arrived may now be recapitulated in the following form:—

I. Normal condition of Law.

Rules of law are rules made by a competent authority to facilitate the fulfilment of rules of morality, and resting upon the assent of the people.

II. Abnormal conditions of Law.

Variation 1.

A certain number of individuals are unwilling to obey the rules of morality and therefore, also, the corresponding rules of law. Hence these rules have to be supported by a legal Sanction.

Variation 2.

Sovereigns occasionally make laws which are at variance with received morality, which violate the principles upon which rules of law ought, according to popular opinion, to be founded, or which unduly fetter individual discretion. These also have to be supported by a legal Sanction.

It will be impossible to allow for both these variations in the remarks which follow. By so doing, indeed, we should lose any clearness that may be derived from the employment of our original abstraction, and it must be sufficient to have pointed out the corrections that have to be introduced before it can be

made to correspond with the facts of life. It is important, however, to lay stress upon *variation* 1, for this, as I have shown, gives rise to a whole department of Law. I shall assume, then, that the *security* upon which Bentham lays so much stress is ensured by the Sanctions which the Law attaches to rules of morality. Rules of law are simply regulations made to explain the rules of morality; they are therefore sufficiently enforced by the legal Sanction attached to the latter.

Hence, we have the following arrangement of Law:

1. Substantive Law.
   - *a.* Laws intended to render the fulfilment of rules of morality possible to individuals.
     - i. Sanitary Law (in part).
     - ii. Property Law.
     - iii. Contract Law, with the Law of Torts, so far as it concerns the determination of liability for injury done.
   - *b.* Laws intended to render the fulfilment of rules of morality possible by combined action.
     - i. Sanitary Law (in part).
     - ii. Poor Laws.
     - iii. Education Laws.
     - iv. Ecclesiastical Laws.
2. Sanctioning Law, or Law which merely enforces moral rules.

   Criminal Law in general, including the enforcement of all judgments obtained in the civil courts.
3. Administrative Law, or Law which regulates the government in its various capacities.

Constitutional Law, with Civil and Criminal Procedure.

It is hardly necessary to add that this does not correspond to any actual division of Civil and Criminal Law. Thus, in our own country, the enforcement of contracts is placed entirely in the Civil Law, and at Rome the same department of Law dealt with theft and assault. This is, however, merely a matter of procedure. The rule of law first determines what is mine and what is my neighbour's. The moral law then forbids me to take my neighbour's property, and if, nevertheless, I do so, I make myself liable to that sanction of the State which supports the moral rule. I break the law now, not through ignorance but through evil design, and whether action is taken against me by a public officer or by the person wronged is a mere matter of detail. Either course is adopted according as the general security will be thereby better maintained. But the point to which I wish to call attention is, that the rule of Substantive Law is only meant to enlighten the person as to his position: if he violates this he violates a rule of morality also, and for that he is punished.

We can now return to the consideration of the different kinds of law-making. We have already seen that the original source of law is Custom, but that this is almost entirely replaced in course of time by Legislation and Science, and I have given a general rule as to the respective functions of these two sources. Of this I shall now speak more at length.

I have said that Custom fails as a source of law,

either through conflict of interests or through complication of interests, and that in the former case it is properly replaced by Legislation, in the latter by Science. When a rule, then, is made by the Legislature it is obeyed because the people trust the good sense of the Legislature, and when it is made by Jurists because they trust the technical knowledge of the Jurists. There are, however, two reasons which in actual practice prevent Science from holding this co-ordinate position with Legislation.

1. Its rules, although they generally unravel complicated interests, yet not seldom decide also between the interests of conflicting classes.

2. It is difficult to obtain unanimity of opinion among Jurists themselves.

It is probably the former reason which has always prevented Science from being recognised as a source of law in England; it was the latter which finally deprived it of that position in the Roman Empire. It is, however, necessary to understand clearly the logical distinction between the provinces of Legislation and of Science as sources of Law, before we consider the actual distinction existing at the present day.

Assuming, then, that apart from actual and historical considerations, there are three sources of Law, Custom, Legislation, and Science, it will be necessary to examine next into the methods in which Law is actually made. Here it will be well to avail ourselves of the distinction drawn with such accuracy by Austin between direct and oblique law-making. Law is made directly when the immediate intention in making it

is to establish a rule ; obliquely when the immediate intention is to decide a case. Austin points out that the great distinction which exists between these methods is, that a rule made directly must be interpreted strictly according to the letter, while a rule made obliquely is interpreted according to the reason which led to its foundation. It may, however, be considered that the real distinction lies in the manner in which each mode attacks the problem that lies before it. Direct legislation proceeds boldly; it assumes that it can foresee all future cases, and makes a rule which shall apply to all of them; oblique legislation is cautious, it proceeds tentatively ; it does not profess to look at more than the case actually before it, and to compare it with all similar cases that have preceded. But it is well known that in this latter case a succession of precedents soon establishes a rule, which has really all the exactness and all the rigidity of a rule made in the direct manner. Hence we see that each style of law-making has its appropriate place, and that each requires to be assisted by the other. When we can clearly foresee a large number of future cases, and when we are sure of the principle by which they should be decided, we ought to make a direct rule which will cover them. But where amid the complication of interests it is difficult to foresee similar cases, and where the principle of decision would not be clear if we could, there it is best to abstain from making a rule and to decide each case as it arises. Each method, therefore, requires to be assisted by the other. Hence :—

1. The rule of direct law must not be so strictly interpreted as to prevent all adjustment of it to actual cases. This is governed by special rules of interpretation, though in England the grammatical interpretation is far too much followed.

2. There must be means for converting oblique law as rapidly as possible into statute law, in order that the trouble of gathering a rule from decided cases may not be gone through over and over again. It was the entire neglect of this point that produced in England the demand for codification which existed some years ago.

It must be remarked that the principle according to which both kinds of law should be made is the principle of utility, but it is used in a somewhat different manner in each case. In making a rule of law directly, while we are not of course forgetful of past cases, yet the immediate foundation of it is a direct appeal to the principle; but in making a rule of law obliquely we do not thus appeal to the principle directly; the process is, indeed, divided into two parts.

1. So far as the new case resembles old ones, it is assumed that the principle of utility is embodied in the former decisions; to these, then, the direct appeal is made.

2. So far, however, as the new case differs from old cases, an appeal is made directly to the principle of utility.

The entire ideal process of law-making may, therefore be exhibited as follows:—

Every new law, so far as it does not embody an actually expressed wish of the people, must be founded upon the principle of utility, but we may regard this principle as existing separately, or as embodied in past decisions.

1. Where we can see our way to a number of cases, and also see how the principle of utility can be carried out, we appeal to the principle at once and make a rule of law directly.

2. Where we cannot see our way clearly either to classes of cases or to the observance of the principle, we make a rule of law obliquely, that is, we wait for a case to arise and then decide it chiefly by reference to the principle as embodied in past decisions, and partly by a direct appeal to utility.

But each method requires to be corrected in the following manner:—

i. The rule of law made directly will probably not have fully anticipated all cases; hence we must have rules of interpretation that will allow it a certain amount of elasticity, so as to carry out the intentions of its authors. These, however, must not change the idea of utility as conceived by them.

ii. The rules of law made obliquely and embodied in decided cases, become gradually ready to be extracted therefrom and expressed as rules of law directly. Provision should therefore be made for this to be regularly done.

If, then, this is the manner in which Law ought to be made we may now enquire of which method Custom, Legislation, and Science respectively avail

themselves, and we shall afterwards consider what is the actual system at present at work in England.

1. *Custom.*—It is difficult to say how Customary Law is actually made, for it grows up gradually and cannot be attributed to any one author. I have elsewhere described it as a system of unconscious adaptation to surrounding circumstances. Every one who at first follows the custom, assists in the making of it; we can only call it a direct perception by each individual of what is most for his advantage in special cases. As soon as this perception dies away, the custom is established, and successive generations follow it merely as law. The only thing that remains then is to express it in rules, and these are probably the unconscious result of a number of cases obliquely decided.

2. *Legislation.* — I have already said that the proper business of Legislation is to decide between conflicting interests; since this should always be done in such a manner as to carry out the principle of utility, we might say that it ought to be done by those who are best conversant with the state of society, *i.e.* by those who have made social science their special study. There has, however, been no people hitherto who have consented to hand over this important function to others, and there are many reasons which make such a course both impossible and undesirable. Wherever, then, a proposed law is seen to affect the welfare of large classes of people, these classes have a natural desire to express an opinion upon what they conceive to be for the greatest happi-

ness of the greatest number, and we need not alter this expression, because the result is frequently to discover what they conceive to be for their own happiness. Hence a new rule which directly affects the interests of the people, and which does not involve a complicated arrangement of details, ought to be made by means of Legislation proper. All such rules are necessarily direct.

3. *Science.*—Lastly, we have to consider in what way by far the largest part of law-making may be done by Science. This comprises a part of direct legislation, the whole of oblique legislation, and the whole of those two branches of supplementary legislation mentioned above. Thus—

i. Direct legislation.

Rules which merely perfect the details of legislative measures, and rules which affect complicated interests about which there is no dispute, are properly made by Jurists.

ii. Oblique legislation.

This is obviously within the province of Science; for either the cases by which it is made are actual ones, and then the law is made by Judges, or the cases by which it is made are imaginary ones, and then the law is made by Jurists.

iii. Supplementary legislation.

a. Interpretation of laws.

b. Abstraction of rules from decided cases.

It is needless to remark that both of these fall within the domain of Science.

Let us now see how these various functions are actually performed in England. It will be unnecessary to take any notice of Custom as a source of Law, for where it does exist, it has been almost entirely replaced by express law, and where this has not been the case, there are no certain marks by which it may be recognised. It has actually become, as Austin says, merely a reason for which a law is made, but no source of law itself. Moreover, we have seen that direct legislation is possible where a number of future cases can be foreseen; but in many matters such foreseeing depends either upon local or upon special knowledge. Hence we must reckon as sources of Law not only the supreme Legislature, but also subordinate Legislatures. We shall then be able to map out the system of law-making as follows:—

I. *Direct Legislation.*

1. By Parliament.

a. Laws are properly made by Parliament when their object is to enforce moral laws, to reconcile conflicting interests which are affected by laws proper, or to make laws interfering with individual discretion.

b. Not satisfied, however, with this work, Parliament frequently attempts to make laws which concern complicated and technical matters. The remedy for this is now being found in the fact that no one assembly can manage thus minutely the affairs of a vast empire; and we have some approach to a better state of things in the appointment of Grand Committees. It is not, however, recognised that there

are many matters which are improper for discussion in Parliament at all, and this has only been allowed so far in certain matters of legal detail; thus several statutes affecting conveyancing merely have passed through Parliament almost without discussion. The only objection to this course is that they often proceed from individual Jurists merely, and do not carry with them the approval of a school of Jurisprudence. Until such a school is created, the only improvement that can be hoped for in this direction is to see new legislation exposed more and more to professional criticism before it is presented to Parliament, and then to have the practice of discussing matters, which are acknowledged to be purely technical, further discouraged. It may, indeed, be impossible or impolitic ever to raise Science, as an independent source of Law, to the same level as the supreme Legislature. If, then, new laws must always be laid *pro forma* before Parliament, this should, as a rule, be merely to satisfy constitutional etiquette.

2. By Subordinate Legislatures.

These are of two kinds, local and technical.

a. Subordinate Local Legislatures.

The usual matters entrusted to these are, of course, those which must be regulated according to local circumstances. Prominent among them are the various arrangements which are dealt with by sanitary law.

b. Subordinate Technical Legislatures.

There are several departments of state which have the framing of rules upon technical matters, and which

properly come under this designation. It is usual to make the laws which proceed from these depend directly upon the supreme Legislature by requiring them to lie for so many days on the tables of the Houses of Parliament. Thus, rules with regard to education are made by the Education Department, rules with regard to trade by the Board of Trade, and so on. We may specially notice that in this way the Judges also constitute a department for the issuing of rules as to procedure subject to the approval of Parliament. It may not be improper to remark that we have here, perhaps, the solution of the question referred to above. I have just said that it may be impossible and impolitic to allow Science a co-ordinate position with Parliament as a source of Law, and yet its functions can only be properly performed if they are carried on with but little interference from that quarter. At a time, then, when the demand is rapidly assuming importance for the constitution of a Ministry of Justice as one of the departments of the State, it may reasonably be suggested that in such a department would be found the proper point of contact between Science and Parliament.

II. *Oblique Legislation.*

In England this is performed entirely by the Judges, and the only cases that are allowed to affect it are those which actually come before the courts for decision. In this matter the Judges perform exclusively the work of the Jurists, and these, however great may be their authority in suggesting changes,

have no such influence as the Roman Jurists had upon this department of Legislation.

III. *Supplementary Legislation.*

1. Interpretation.

I have already remarked that owing to the excessive strictness with which the letter of the law is followed in England, there is at present hardly any proper system of interpretation. Statute law is undoubtedly good, but there is no necessity to carry out the literal meaning with such strictness as to make it like an edged weapon whose very use is dangerous. Much of the objection to codification would cease if statute law were subjected to a rational system of interpretation.

2. Expression of Judiciary Law in rules.

This is a matter which peculiarly belongs to the Science of Law, and it is with this that nearly the whole of our legal literature is concerned. The only objection to such literature is that it carries no intrinsic weight, and hence in deciding a case the whole process of abstracting a rule has often to be gone through in open court. For this there are two remedies.

i. The independent foundation of a school of Jurisprudence, which shall perform in a systematic manner the work that is now done at random and without system. I am, of course, aware that such a School cannot be created at will, but must spring up naturally. It might, perhaps, be supposed that the Inns of Court would be the proper bodies to give

such assistance and encouragement as in the nature of things are possible; but owing to the exceptional position which the Judges have acquired in the making of our Law, the true life of the legal profession is to be seen only in Court practice. Hitherto, indeed, the immediate application of Law is all that we have in general concerned ourselves with, and it has not been duly recognised that the progress of Law depends as much on the cultivation of the theory as the correctness of the practice. In this connection it may be proper to advert to the comparison which is sometimes drawn between our own and continental countries in the matter of codification. Sir Henry Maine has remarked that the one object of Jurisprudence is the production of a Code, and Sir Roland Wilson has surmised that this, when it does come, will be the work of some one legal genius, and will bear such evident marks of goodness that the people will immediately accept it, and call for the Code, the whole Code, and nothing but the Code.[1] The first of these remarks, of course, is as true for Jurisprudence as it is for any other science which has for its object the guidance of human action; all of these issue finally in a set of rules. The latter seems to lay too much stress on the work of the individual, and too little on the gradually accumulating labours of the School in the midst of which he must be reared. But if we turn our eyes to continental countries, we see that with them the Jurists have always occupied a high position in legal matters, and that the theory of

[1] *Modern English Law*, p. 180.

Law has been gradually elaborated by the long continued study of the Roman Law. This matter in itself would be fruitful in instruction were this the place to follow it up. It must be sufficient, however, to point out that it is useless to hope for any Code or collection of practical rules which shall be satisfactory, until English professional opinion has recognised that the practitioners of Law are helpless unless they have behind them a well-established School, whose special business is the theory of Law. I do not of course mean to imply that the Jurists should be separated from actual contact with and knowledge of the world, and I may, perhaps, remark that some recent appointments to legal professorships seem to show that the exact want which I have been pointing out is at length being realised.

ii. Or the actual work may be done under the auspices of Government. To this source, indeed, people usually look for the initiative in codification, and were the foundation of an independent school of Jurisprudence hopeless, this task, like others, might in despair be thrown on that miraculous institution; for it is curious to notice that since Divine Right has been withdrawn from Sovereigns a kind of Divine Power has been ascribed to them instead.

It will be safe, however, to say that any real improvement in the vast mass of our Law must come from both these sources. Government cannot move until Jurisprudence has done its work, and, with our present ideas, Judges cannot accept new rules until they have received the approval of Government. In

what way this adjustment of functions will be brought about I need not now speculate, but there must at least be rather more self-assertion on the part of professional Jurists, as soon as legal Science has in popular estimation justified its existence, and a great deal less on the part of amateur legislators.

We may sum up these remarks, then, by saying that the actual sources of Law are at present the Supreme and Subordinate Legislatures, and the Judges; that to these last the process of oblique legislation is almost entirely confined, but that they are regarded in this capacity not as Jurists, but as the servants of the State; and that no considerable improvement in our Law can be hoped for until legal Science has been established upon a firm and independent basis.

I have thus explained the nature of Positive Law, and its relations to Morality and to Politics. The next step would be to consider the bearing of the above remarks upon our conceptions of legal Rights and Duties. To do this, however, would be beyond the sphere of the present work, and I must content myself with remarking that the attention which is now paid to Substantive, as opposed to merely Adjective Law, seems to call for a new analysis of these conceptions, an analysis supplementary to that of Austin, which depends almost entirely on the enforcement of Rights and neglects their substance.

According to the view, then, which I have thus tried to present, Law is a collection of rules regulat-

ing either human actions or human relations, which spring from and explain the current rules of morality, and which therefore depend for their support upon the general assent of the people. Owing, however, to the fact that individual wills are sometimes in opposition to the general will, the Law must occasionally be enforced by the physical power of the community, and, owing to the complication of human affairs, it must sometimes be decided by courts of law. Further, these rules are made by a Sovereign who is acquainted with the wishes of the people, either directly in accordance with such wishes where they can be ascertained, or where this is not possible by reference to the principle of utility, or else upon the advice of Jurists who are skilled in legal matters.

It will not be necessary to say much more in justification of this. It does not pretend to be a definition which in all cases corresponds to the facts of life; such a definition, indeed, it is perhaps impossible to frame. It does, however, seem to me to represent in general the condition of Law among those peoples whose legal development has been least interrupted by foreign conquest, and to set before us an ideal, not too far removed from reality, towards which in civilised communities Law gradually tends. I have elsewhere said that Austin's system, useful as it may be, errs from attaching too great importance to certain prominent external marks of Law. These marks I by no means neglect, but I think they may properly be relegated to a secondary position. Force is an occasional necessity in the administration of Law, but

when it has to be extensively employed we know that something is wrong with the rules of law, and that they offend against current morality; where, again, popular resistance to the Law passes a certain point, and is not opposed to the opinion of other more powerful classes of a community it becomes a dead letter. Nothing could show more clearly than this that Law does not in general rely on force for its maintenance, but only summons it occasionally to its assistance.

In putting forward such a view I should like to say that personally I am under the greatest obligations to Austin's work. The accuracy of his analysis and his careful avoidance of all ambiguity, have always seemed to me to far outweigh the faults that are charged against his style, and from him I discovered that something of the accuracy of mathematical reasoning might be introduced into the moral sciences. If, then, I have ventured to wander from the path which he marked out, it is in no spirit of disrespect to so great a master, but because more recent investigations at home and the work of eminent Jurists abroad seemed to reveal essential features in Law which he had failed to grasp. Such failure, indeed, is not wonderful if we remember who were his teachers, Paley in Morality and Hobbes in Law. Each alike placed the spring of human action in fear—with one Morality was due to fear of God, with the other Law was due to fear of man. But as to the former idea, while I do not say that it has been or ever will be entirely banished, yet it has at least been seriously modified. We now know more about

the growth of Morality and the facts of human nature, and we recognise that actual Morality exists because its rules are consonant to the average requirements and opinions of men. In the same way it is time to recognise that Law also does not repose on the command of a Sovereign, however it may take this shape sometimes; that it cannot venture long to oppose current rules of morality, or popular opinion as to the observance of these rules; and that every display of Force does not so much vindicate the majesty of the Law, as show that there is a defect somewhere in the social machine; either that the rule of Law offends a rule of Morality, or that a criminal has been allowed to grow up in the midst of society.

In conclusion, we may say that no idea of Law, as it exists in civilised communities of the present day, can be correct, which ignores the direct and immediate effect that public opinion has upon it, or which abstains from assigning to Force its proper position in the social system, a position which it occupies as the servant of Law, and in which it must nicely adjust itself to every case with a view to the general progress of Morality.

THE END.

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